

VOLUME 5

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable YVONNE GONZALEZ ROGERS, Judge

EPIC GAMES, INC.,)	
)	
Plaintiff,)	NO. C-20-5640 YGR
)	
vs.)	Friday, May 7, 2021
)	
APPLE, INC.,)	Oakland, California
)	
Defendant.)	BENCH TRIAL
)	
APPLE, INC.,)	
)	
Counterclaimant,)	
)	
vs.)	
)	
EPIC GAMES, Inc.,)	
)	
Counter-Defendant.)	
)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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(Appearances continued.)

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TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

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1 FRIDAY, MAY 7, 2021

8:00 a.m.

2 P R O C E E D I N G S

3 **THE CLERK:** Calling CV 20-5640, Epic Games, Inc., vs.

4 Apple, Inc.

5 Counsel, please state appearances.

6 **MR. BORNSTEIN:** Good morning, Your Honor. Gary

7 Bornstein for Epic Games.

8 **THE COURT:** Good morning, Mr. Bornstein.

9 **MS. MOSKOWITZ:** Good morning, Your Honor. Lauren

10 Moskowitz, also for Epic.

11 **THE COURT:** Good morning.

12 **MS. KLOSS:** Good morning, Your Honor. Lauren Kloss

13 for Epic Games.

14 **THE COURT:** Okay. Ms. Kloss, good morning.

15 **MS. BUI:** Good morning, Your Honor. Samantha Bui for

16 Epic Games.

17 **THE COURT:** Samantha Bui. I see. Great.

18 Mr. Sweeney, good morning, sir.

19 **MR. SWEENEY:** Good morning, Your Honor.

20 **THE COURT:** On the defense side.

21 I forgot to say good morning to Mr. Rudd. Good morning.

22 **MR. RUDD:** Good morning, Your Honor.

23 **MS. MOYÉ:** Good morning, Your Honor. Veronica Moyé

24 for Apple.

25 **THE COURT:** Good morning, Ms. Moyé.

1 **MR. DOREN:** Good morning, Your Honor. Richard Doren
2 for Apple.

3 **THE COURT:** Good morning, sir.

4 **MS. DUNN:** Good morning, Your Honor. Karen Dunn for
5 Apple.

6 **THE COURT:** Ms. Dunn, good morning.

7 **MS. DANSEY:** Good morning, Your Honor. Lauren Dansey
8 for Apple.

9 **THE COURT:** Ms. Dansey, good morning.

10 **MS. ADAMS:** Good morning, Your Honor. Kate Adams for
11 Apple.

12 **THE COURT:** Kate Adams, yes. Good morning.

13 And, Mr. Schiller, good morning. And why isn't it on --
14 okay.

15 Mr. Spalding, good morning.

16 **MR. SPALDING:** Good morning, Your Honor.

17 **THE COURT:** In the gallery we have Kellen Browning
18 from *The New York Times*. Good morning.

19 And Elizabeth Lopatto from *The Verge*.

20 **MS. LOPPATO:** Good morning.

21 **THE COURT:** Good morning.

22 And Ms. Manifold is back.

23 **MS. MANIFOLD:** Good morning, Your Honor.

24 **THE COURT:** A couple of things -- a number of things
25 to do this morning.

1 Mr. Bornstein, I don't know that you've been in the
2 courtroom every morning, but do you have any things on your
3 list of things to do, sir?

4 **MR. BORNSTEIN:** I do, Your Honor. I assure you I've
5 been listening. We have been trying to take the six-person
6 rule seriously so we have been able to get multiple people in
7 the room.

8 **THE COURT:** That's great. Thank you.

9 **MR. BORNSTEIN:** The one thing I had on the list this
10 morning is probably Your Honor's favorite topic, sealing. We
11 have been coordinating with the -- the parties have been
12 coordinating and trying to make this as efficient for the
13 Court as we can, and as Your Honor may have seen, each of us
14 has filed what we're thinking of as an omnibus sealing motion
15 in which we have not actually requested any judicial action at
16 this point, and what we are hoping to do is to try, on a
17 rolling basis, to alert the Court as to the documents that are
18 subject to that motion which actually get used in one way or
19 another at trial so that the question as to whether they need
20 in fact to be sealed becomes live.

21 And what we would propose and have agreed as a process, if
22 it's acceptable to the Court, is when that happens, to present
23 to the Court a version of the document reflecting the tailored
24 proposed sealing that would be highlighted so Your Honor could
25 see what information is at issue, and then once we have a

1 ruling from the Court on that, we would, to the extent
2 appropriate, post a redacted version of the document for the
3 public.

4 **THE COURT:** Mr. Doren?

5 **MR. DOREN:** Agreed, Your Honor, as a proposal to the
6 Court.

7 **THE COURT:** What would have also been easier is just
8 to say a notice as opposed to a motion because I don't like to
9 have outstanding motions. And what I was going to do is deny
10 them without prejudice to actually bringing this process.
11 That's what I was going to recommend this morning, but I don't
12 like to -- for people to think that somehow the Court is not
13 ruling on your motions, and until it becomes ripe, it doesn't
14 seem to me to be an issue. So that's what I'd like to do.

15 I'll have those documents with me so at least I'm on
16 notice. I'll try this weekend to make some notations in some
17 of the documents that I use to manage exhibits so that at
18 least I can be alerted that there may be some kind of issue,
19 but the motions themselves I'm going to say are denied without
20 prejudice, but now I'll go and use the information, if that
21 works.

22 **MR. DOREN:** That works, Your Honor.

23 **MR. BORNSTEIN:** I was going to volunteer, we could
24 withdraw the motions, if it's easier for the Court.

25 **THE COURT:** It's just the minutes, and I have a

1 little gavel, and I get to take the gavel off my docket so
2 it's not out there bugging me.

3 Okay. So that takes care of one of our joint issues.

4 What else do you have, Mr. Bornstein?

5 **MR. BORNSTEIN:** The only other issue is to advise the
6 Court the parties are meeting and conferring and I assume will
7 be reaching agreement shortly on the amount of time associated
8 with the deposition designations that we had introduced
9 yesterday.

10 **THE COURT:** Okay. That's fine.

11 Anything else, Mr. Doren?

12 **MR. DOREN:** No new items, Your Honor.

13 **THE COURT:** Okay. While I have the two of you at the
14 podium -- and it's unfortunate that Ms. Forrest wasn't here
15 for this piece -- we are now at the end of a week, and I
16 wanted to say -- I wanted to thank and congratulate both your
17 clients and team leadership for the amount of what I would
18 call diversity on your trial teams. This is something that
19 judges here, at least in the Northern District, we talk a lot
20 about and we try to encourage. And I've tried a lot of cases
21 and have never seen so much diversity on trial teams.

22 And I just thought that you must have thought about it,
23 and I wanted to congratulate you and thank the clients as well
24 for, you know, really focusing on those issues as important.
25 These are important issues. They affect lots of people, and

1 it's really terrific to see so much diversity in the
2 courtroom, so I thank you.

3 **MR. BORNSTEIN:** Thank you, Your Honor.

4 **MR. DOREN:** Thank you, Your Honor. I wish you could
5 see my smile. Thank you.

6 **THE COURT:** All right.

7 Exhibits. Let's talk about exhibits because I spent a lot
8 of time on this last night. What a mess.

9 I'm not going to go chronologically from the beginning. I
10 really just want to focus on what happened over the last two
11 days.

12 **MS. KLOSS:** Yes, Your Honor.

13 **MS. DANSEY:** Yes, Your Honor.

14 **THE COURT:** Go ahead and make your appearances.

15 **MS. KLOSS:** Good morning, Your Honor. I am Lauren
16 Kloss for Epic Games.

17 **MS. DANSEY:** Good morning, Your Honor. Lauren Dansey
18 for Apple.

19 **THE COURT:** Good morning. And I take it you all
20 didn't -- there are a lot of "Laurens."

21 **MS. DANSEY:** I think there are three in the court
22 right now, Your Honor.

23 **THE COURT:** You know, it's really interesting because
24 names do come in waves, and there weren't a lot of -- well, I
25 guess there were a few "Laurens" when I was going to college,

1 but I do know my older son has a lot of friends whose name is
2 Lauren so that must have been the era.

3 So what I have for May 5th, I admitted the following:
4 3815, 2476, 5523, 2311, 5518, 5532, 2618, 2619, 2621, 2622,
5 4119 -- I believe 4022 had been previously admitted -- and
6 4561. That's what I show I did on May 5th.

7 Do you have others?

8 **MS. KLOSS:** Your Honor, I believe 5363 may be among
9 that list as well.

10 **THE COURT:** 5363?

11 **MS. KLOSS:** Yes, Your Honor.

12 **MS. DANSEY:** Yes, Your Honor.

13 **THE COURT:** Okay. So that's admitted.

14 Let's go then to yesterday.

15 I provisionally admitted 2415. And then I admitted 2452,
16 4496, 3472, 06, 52, 60, 61, 72, 112, 201 and 202, but those
17 were pending because of sealing issues.

18 **MS. DANSEY:** Yes, Your Honor.

19 **MS. KLOSS:** Yes, Your Honor. And I believe those may
20 have been resolved by the parties this morning, and they are
21 pending the Court's resolution of the proposal.

22 **THE COURT:** You both agreed?

23 **MS. DANSEY:** Yes, Your Honor. And we have copies of
24 the proposed exhibits, of the proposed redactions.

25 **THE COURT:** So I will take a look at those.

1 827, 854, 57, 146, 197, 198, 422, 2185, 2281, 4178, 59,
2 57, 2060, 4496, 3472, 2284, 2062, 66, 63, 2197, 2190, 64, 174,
3 2017, 2016, 2173, 3422. I had two different notes on this. I
4 don't know if it's 3462 or 3642.

5 **MS. KLOSS:** Your Honor, we have 3642.

6 **MS. DANSEY:** So do we, Your Honor.

7 **THE COURT:** Okay. So 3642.

8 3636, 2951, 2952, 2953, 202, 314, but there was a
9 confidentiality issue pending.

10 **MS. DANSEY:** Yes, Your Honor. And I believe that's
11 also resolved. We have a copy of the proposed redactions.

12 **THE COURT:** Okay.

13 56, 2052, 6, 301, 305, 257, 300, 858, 4374, and 5467.

14 Okay. So that's what I have. Anything that you have?
15 Let's start with Ms. Kloss.

16 **MS. KLOSS:** Yes. I believe we also had PX64.

17 **THE COURT:** I said 64, so I have that one.

18 **MS. KLOSS:** Thank you, Your Honor.

19 PX744 is pending hearsay.

20 PX2076.

21 **THE COURT:** Yeah. I didn't do the pending ones so
22 what I have pending is 65, 67, and 744.

23 **MS. KLOSS:** Yes, Your Honor. That matches what we
24 have pending as well.

25 I would also note then that PX2451 is also provisionally

1 admitted pending the confidentiality resolution.

2 **THE COURT:** Right. That was the very first one.

3 Oh, wait. I said 2414. You said --

4 **MS. KLOSS:** 2451.

5 **THE COURT:** Okay.

6 Ms. Dansey, do you have that as well?

7 **MS. DANSEY:** Yes, Your Honor. And you said you had
8 2014 as well?

9 **THE COURT:** I had 2415 as provisional. Is that
10 wrong?

11 **THE CLERK:** I have 51. 2451 I have --

12 **THE COURT:** Okay. So that was my inversion. So not
13 2415, but 2451.

14 **MS. DANSEY:** Correct.

15 **THE COURT:** Okay. What else?

16 **MS. KLOSS:** Your Honor, that's what I have on my
17 list.

18 I would also note that the parties conferred this morning
19 and wanted to offer the possibility that we would provide an
20 amended or a stipulated minutes containing all of the exhibits
21 that we believe have been admitted so that it's collected in
22 one place and easier for the Court to have a list of all the
23 admitted exhibits up to this point, if that would be amenable
24 to the Court.

25 **THE COURT:** I don't know that -- I don't need it.

1 Ms. Stone, do you want that?

2 **THE CLERK:** You know, I prefer day-by-day to put them
3 in, and all the minutes are up, and you can gather them, but
4 that's --

5 **MS. KLOSS:** Okay.

6 **THE CLERK:** -- that's duplicative work for me.

7 **MS. DANSEY:** In that case, Your Honor, if we have any
8 corrections or amendments to the minutes, should we --

9 **THE COURT:** That's what this process is for.

10 **MS. DANSEY:** Right.

11 **THE COURT:** So do you see something in the minutes
12 that you would like corrected?

13 **MS. DANSEY:** Yes, Your Honor.

14 **THE COURT:** What is that?

15 **MS. DANSEY:** On the minutes for May 4th, I believe we
16 should add Exhibit 4036.

17 **THE CLERK:** I can add them later. If I keep putting
18 in amended, you know -- but for me, you know, I can put it on
19 the next minute sheet and say, you know, the admitted date.

20 **THE COURT:** So Ms. Stone will just make a note as we
21 go through the minutes. And if you -- I don't want to add
22 work for her.

23 **MS. DANSEY:** Of course.

24 In that case, Your Honor --

25 **THE COURT:** And at the very end, we'll do this

1 chronologically from the beginning. So you'll have -- we will
2 have a complete record.

3 **MS. KLOSS:** Okay. Thank you, Your Honor.

4 **MS. DANSEY:** Thank you, Your Honor.

5 **THE COURT:** I use an Excel spreadsheet to figure it
6 out. Okay?

7 **MS. DANSEY:** Okay.

8 **MS. KLOSS:** Okay.

9 **THE COURT:** All right. Terrific.

10 **MS. KLOSS:** Thank you, Your Honor.

11 **MS. DANSEY:** Thank you, Your Honor.

12 **THE COURT:** I didn't ask, given all of the confusion
13 yesterday with respect to documents -- and you can see how
14 they were going all over the place in terms of numbering -- I
15 did finally relent and say go ahead, give me the binder. And,
16 you know, all I can say is I tried.

17 What I will also say, though, is if it's admitted, I don't
18 need a second; that is, I'm trying to keep all the admitted
19 ones up here. I write on my documents. Some of them, as you
20 all I'm sure have -- right there you probably have your binder
21 of hot docs and you look at them and you make notes on them as
22 the trial goes along. So you do not have to include in a
23 binder for me anything that's already been admitted because
24 I've have it. I will have it right here handy and accessible.
25 Okay? And if not, I have a hundred binders to go and find it.

1 Okay. So what do I have up here? These are replacement
2 exhibits?

3 **THE CLERK:** Yes. They handed -- Defense handed up --

4 **THE COURT:** Mr. Bornstein, what are these?

5 **THE CLERK:** I think they're Apple's.

6 **MS. DANSEY:** Your Honor, I believe that those are
7 replacement exhibits. I can also take a look and double
8 check, but I believe our paralegal prepared some --

9 **THE COURT:** So replacement in what sense?

10 **MS. DANSEY:** I'm sorry. I actually think that those
11 were the exhibits that were admitted yesterday.

12 **THE CLERK:** Redacted is what was communicated to me.
13 They were redacted exhibits.

14 **THE COURT:** Here. Look at them. I'm still not sure
15 what these are.

16 **MS. DANSEY:** I believe what our process is,
17 Your Honor, is each day we provide certain --

18 **THE COURT:** So each day you are supposed to provide
19 Ms. Stone with the official court exhibit, as you have been, I
20 believe.

21 **MS. DANSEY:** Yes.

22 **THE COURT:** And so what are those?

23 **MS. DANSEY:** I believe that these are replacement
24 exhibits, that they should replace what you have for 4167.

25 **THE COURT:** When you say "you," do you mean Ms. Stone

1 or me personally?

2 **MS. DANSEY:** I believe it's for the Court's official
3 records.

4 **THE COURT:** Okay.

5 So those are for you, Ms. Stone.

6 **THE CLERK:** All right. I thought it was for her.
7 Thank you.

8 **THE COURT:** Okay. Anything else before we get
9 started? Mr. Bornstein?

10 **MR. BORNSTEIN:** No, Your Honor. I was just
11 conferring with Ms. Dansey to make sure we had seen the
12 documents that were handed up, but we will work that out among
13 the parties.

14 **THE COURT:** Okay.

15 Ms. Dansey, so just in general, you shouldn't give
16 anything to the Court without letting the other side see it.

17 **MS. DANSEY:** Yes, Your Honor.

18 **THE COURT:** Okay. All right. Let's bring our
19 witness back and get started.

20 Okay. Good morning, sir.

21 **THE WITNESS:** Good morning.

22 **THE COURT:** You may be seated. I will remind that
23 you are still under oath.
24
25

KOSMYNKA - CROSS RESUMED - MOYÉ

TRYSTAN KOSMYNKA,

called as a witness for the Plaintiff, having been previously
duly sworn, testified further as follows:

THE COURT: Let's do a test on your mic.

THE WITNESS: Testing.

THE COURT: Everybody can hear okay.

Ms. Moyé, good morning. You may proceed.

CROSS-EXAMINATION (resumed)

BY MS. MOYÉ:

Q. Good morning, Mr. Kosmynka. Are you ready to proceed?

A. Yes.

Q. We have a binder of documents that we will be referring to
today.

Your Honor, may I approach the witness and provide a copy?

THE COURT: You may.

MS. MOYÉ: We provided a copy to Epic's counsel
yesterday, Your Honor. I also have a version for you.

THE COURT: Okay. Thank you.

MS. MOYÉ: Thank you, Mr. Kosmynka.

Q. I'd like to start by clarifying a few points that we
covered yesterday. First starting with the numbers on
Demonstrative No. 1, if we could take a look at that again.
And this demonstrative related to DX --

THE COURT: Are you going to publish this?

THE CLERK: Sorry. I just turned it over so that

KOSMYNKA - CROSS RESUMED - MOYÉ

1 they could do it.

2 **THE COURT:** Okay. Thank you.

3 **BY MS. MOYÉ:**

4 **Q.** This demonstrative was a summary of the entries that we
5 had in DX5467, Mr. Kosmyнка. Do you recall that?

6 **A.** Yes, I do.

7 **Q.** And it was a summary of the weekly reports we were able to
8 locate for these time periods; is that correct?

9 **A.** That's right.

10 **MS. MOSKOWITZ:** Objection, Your Honor. Leading.

11 **BY MS. MOYÉ:**

12 **Q.** Was this a summary of the weekly reports that we were able
13 to locate?

14 **A.** Yes.

15 **Q.** Were we able to locate all of the weekly reports for these
16 years, Mr. Kosmyнка? You can look at DX5467 if that helps you
17 to answer the question.

18 **A.** I don't see any reports missing from this spreadsheet.
19 It's possible that there was -- all of the reports that were
20 available could have been in here. It's possible that maybe
21 on like a week of Christmas or something we would not have had
22 a report available.

23 **Q.** And for -- with respect to missing reports, if there were
24 such reports, how would that impact the numbers that we see
25 here?

KOSMYNKA - CROSS RESUMED - MOYÉ

1 **A.** The number of submissions would have increased. The
2 number of rejected submissions would have increased. I
3 believe the ratio would have remained the same.

4 **Q.** Thank you, sir.

5 And I would now like to refer you also to the questioning
6 about Roblox from Epic's counsel, and in particular, you were
7 asked questions about PX305. I don't know if you still have
8 the Epic binder there available to you.

9 You do not?

10 **A.** No.

11 **MS. MOYÉ:** Your Honor, may I approach the witness to
12 provide a copy?

13 **THE COURT:** You may.

14 **BY MS. MOYÉ:**

15 **Q.** Do you remember the questioning about this document,
16 Mr. Kosmynka?

17 **A.** I do.

18 **Q.** Could we look at the language below the words "red text"
19 at the bottom there? Was that language submitted by Roblox
20 itself, Mr. Kosmynka?

21 **A.** No. This red text would have been written by a reviewer
22 within App Review.

23 **Q.** Okay. And your comment directly above that, if we could
24 take a look at that. "I was surprised."

25 **A.** Yes.

KOSMYNKA - CROSS RESUMED - MOYÉ

1 **Q.** Was that comment based on a reading of that text?

2 **A.** Yes.

3 **Q.** After making that comment, were there discussions about
4 Roblox in the ERB?

5 **A.** Certainly Roblox has been reviewed by ERB since this
6 email.

7 **Q.** And did the ERB determine whether Roblox was a store
8 within a store?

9 **A.** We determined it was not.

10 **Q.** You determined it was not, you said?

11 **A.** It was not.

12 **Q.** And why was that determination made?

13 **A.** So as I said yesterday, there's experiences within Roblox
14 that from a point of review we would not look at as a game.
15 These are configurations that enable a particular experience
16 or world. It's akin to something like a *Minecraft* map, and so
17 while that configuration can --

18 **THE COURT:** Isn't *Minecraft* a game?

19 **THE WITNESS:** *Minecraft* itself is a game, yes.

20 **THE COURT:** So I don't understand -- you said that
21 yesterday, too. I don't understand the distinction you're
22 making.

23 **THE WITNESS:** Your Honor, in the case of *Minecraft*,
24 you join a server, and when you join a server, that server has
25 a particular world or a canvas, and so you have four kids,

KOSMYNKA - CROSS RESUMED - MOYÉ

1 they play *Minecraft*. When they join a particular world, there
2 may be a castle that is already prebuilt into that, and so
3 that would be a configuration, but the features and
4 functionality of the overall game itself is not changing. And
5 so in the same way that they could have a world be a castle,
6 they could also have a world be a farm, but the mechanics of
7 how each one of those experiences work remains the same and
8 the capabilities of each one of those experiences -- when I
9 speak of capabilities, I say security and privacy implications
10 remain the same.

11 These experiences are not capable of doing dynamic things
12 beyond what the creator of the experience has already
13 predefined into that. And so that is akin to some other apps
14 as well. Social experiences. Think of Snapchat. You have
15 lenses in Snapchat. You can pop the camera and put bunny ears
16 on your face. That's also an experience. It's a
17 configuration file as opposed to software that's downloaded
18 that changes the entire construct of the app.

19 **THE COURT:** All right. Go ahead.

20 **BY MS. MOYÉ:**

21 **Q.** Mr. Kosmynka, did the ERB determine that Roblox itself was
22 not a game?

23 **A.** Yes. I believe we look at Roblox as an app.

24 **Q.** Is Roblox listed on the App Store as a game?

25 **A.** I'm not sure.

KOSMYNKA - CROSS RESUMED - MOYÉ

1 **Q.** Who makes the determination on whether an app is listed as
2 a game or not?

3 **A.** The developer.

4 **Q.** And in the case of *Fortnite*, when *Fortnite* was available
5 on the App Store, was it listed as a game?

6 **A.** I believe so.

7 **Q.** And is that because Epic itself decided to list Roblox as
8 a game?

9 **A.** Yes.

10 **Q.** And you were describing to the Court in the Roblox context
11 different features and functionality you referred to.

12 **A.** Yes.

13 **Q.** Were you referring to the different experiences within
14 Roblox?

15 **A.** No. I was referring to the features and functionality of
16 Roblox itself.

17 **Q.** And did the ERB determine that there are not additional
18 features and functionalities added in the Roblox context?

19 **MS. MOSKOWITZ:** Objection. Leading.

20 **THE COURT:** Sustained.

21 **BY MS. MOYÉ:**

22 **Q.** What did the ERB determine with respect to different
23 features and functionalities within Roblox?

24 **A.** These experiences that a user would enable within Roblox
25 would provide them with a different world, but as far as chat

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1 and purchase flows, the ability to communicate with their
2 friends, find their friends, this is all core to the overall
3 Roblox app experience, Roblox app itself, and so the
4 experiences that would have been enabled by a customer are
5 bounded and unable to do things outside of what Roblox itself
6 is capable of doing.

7 **Q.** What was the conclusion with respect to whether Roblox
8 enabled users to download additional features and
9 functionality?

10 **A.** It's compliant with that rule.

11 **Q.** And what -- because why, Mr. --

12 **A.** Because it does not introduce new features and
13 functionality.

14 **Q.** Do you believe, Mr. Kosmynka, that allowing a store within
15 a store on the App Store would create safety issues?

16 **A.** Absolutely.

17 **Q.** And can you explain why?

18 **A.** So users, when they buy an iPhone or an iPad -- thinking
19 about my kids -- when this do this, they expect to go to the
20 App Store and get safe and trusted apps. There are absolutely
21 cases where, whether it be through advertising or other ways
22 to get in touch with a particular user, that they could be
23 manipulated into an experience that they think is safe and
24 trusted on the surface, and then you go deeper into that
25 experience and realize that actually none of the content is

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1 reviewed, none of the software is reviewed, and that has
2 severe ramifications for security, privacy, and customer
3 safety.

4 **Q.** Thank you, Mr. Kosmynka.

5 And just a couple of questions about TestFlight, the
6 company you founded. I neglected to ask you, when was
7 TestFlight founded?

8 **A.** My daughter was around -- it was ten years, 2010.

9 **Q.** Thank you.

10 And when was TestFlight acquired by Apple?

11 **A.** I believe it was 2013.

12 **Q.** And was the functionality of TestFlight changed after it
13 was acquired by Apple?

14 **A.** Absolutely.

15 **Q.** Is TestFlight, as it functions today -- is it the same as
16 TestFlight as it functioned when it was rejected during the
17 app submission process that you undertook prior to joining
18 Apple?

19 **A.** No.

20 **Q.** Thank you, Mr. Kosmynka.

21 Let's talk about your App Review team.

22 And we have a demonstrative that will help us walk through
23 this.

24 First, can you tell us what are the functionalities that
25 happen in the iOS, macOS, tvOS, watchOS, and TestFlight area

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1 that we have here?

2 **A.** So I would look at these as these are skills or platforms
3 that the team reviews in, and so we would refer to this kind
4 of cluster as our Operations Team. And so these are the
5 specialists that review apps as their primary and really only
6 function.

7 And then moving into the Policy Escalations and Notables
8 Team, policy and escalations is there as a support
9 organization for reviewers. The reviewers are able to
10 escalate policy questions, escalate precedent-setting apps,
11 escalate apps that could potentially have a note-sized impact
12 on customers in potentially negative ways. There is a lot of
13 scenarios in which an escalation is warranted.

14 And in the case of Notables, there is apps that impact
15 tens of millions, hundreds of millions of customers, and we
16 want to make sure that we get those decisions right, so
17 Notables is a group of specialists, reviewers that are most
18 senior reviewers that are familiar with some of the
19 complexities with apps that have such a large impact.

20 **Q.** Thank you, Mr. Kosmynka.

21 And we next see a box with ASI, ARC, and TI. What are
22 those functionalities?

23 **A.** ASI, we refer to this group as App Store Improvements.
24 ACR is App Review Compliance, and TI is Technical
25 Investigations.

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1 These are grouped together because they really work very
2 closely together. ARC receives complaints from -- or reports
3 from customers, developers, executive escalations, the press.
4 We watch social media channels as well to get reports of
5 particular potential review violations. And so the ARC team
6 would re-review that request, that app, and take the
7 appropriate action.

8 In the event that something is a more deep-rooted
9 technical challenge with a particular app or it's doing
10 something and we're not familiar with how that is either
11 possible or seems like there could be some malicious activity
12 at a lower level, the technical investigations team would look
13 at that.

14 And App Store Improvements is -- it's an ongoing process
15 to continuously clean and curate the live apps on the store.

16 **Q.** Thank you, Mr. Kosmynka.

17 And Expedites, Developer Advocates, and ARB, would you
18 explain those functionalities?

19 **A.** These are developer services.

20 Expedites is facilitated through a forum that every
21 developer has access to on developer.apple.com. They can
22 submit an expedite request at any point for, say, a
23 time-sensitive event and they'd like to get their app to the
24 store as quickly as possible, and so there is a team that
25 helps chaperon those apps through the process.

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1 Developer Advocates is a team dedicated to phoning
2 developers. Developers can request calls themselves through
3 the App Review process, and reviewers can, throughout the
4 process as well, escalate it to a call because there may be a
5 communication challenge with the particular developer.

6 And ARB is our App Review Board, and App Review Board
7 handles appeals.

8 **Q.** Thank you, Mr. Kosmynka.

9 Training, Content and Communications. Would you explain
10 those functions?

11 **A.** Yeah. We have a dedicated training function which focuses
12 on training both new hires within App Review but also
13 uptraining existing reviewers for a variety of reasons.

14 And Content and Communications supports training but they
15 also support the entire organization to make sure that our
16 policies are clearly documented for reviewers and the
17 workflows are documented for reviewers. So those teams are
18 critical.

19 **Q.** Do those who review apps have to go through any form of
20 training?

21 **A.** Absolutely.

22 **Q.** How much training, Mr. Kosmynka?

23 **A.** So for a new-hire class, the training starts at six weeks,
24 and it's really -- I like to refer to it as an apprenticeship
25 model, and so they start the first week, which is really

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1 theoretical, kind of instructor-led training, and then by the
2 second week, they are actually partnered with senior
3 specialists that we would call mentors that would assist them
4 and walk them through reviewing of very simple generic
5 updates, we would call it.

6 And then by week six, they're actually able to review apps
7 themselves, if they've met the quality -- quality targets
8 throughout the process thus far. And the apps they would be
9 reviewing would be limited to generic updates.

10 And then from that point forward, we can add additional
11 skills based on how the reviewer is doing and their level of
12 quality and -- and productivity to that point.

13 **Q.** The Business Excellence Unit or Functionality, what occurs
14 there?

15 **A.** So Business Excellence is -- it's a quality and auditing
16 organization. The word "auditing" I think makes reviewers
17 uncomfortable, as it should, and so we talk about this as
18 business excellence because the goal isn't simply to look at a
19 reviewer's mistake and put that on the specialist. We audit
20 the process, the policy, the performance of the team, the
21 capabilities with the tools, and there is a dedicated team of
22 quality engineers within business excellence that owns that
23 process.

24 So with every mistake that we've made, that will go
25 through the Business Excellence Team. We'll do a root-cause

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1 analysis and make potential -- whatever necessary
2 improvements, whether that is improvements to tools or
3 performance management of individuals within App Review.

4 **Q.** And, finally, we have Projects and Infrastructure Tech
5 OPS. Could you explain the work that occurs in there?

6 **A.** Projects and Infrastructure, with every new release of our
7 operating systems and hardware, we introduce new needs for App
8 Review, and so we need teams dedicated to making sure that App
9 Review, as an organization, is ready to -- to -- to perform in
10 those scenarios.

11 Technical Operations is there to support the reviewers.
12 Reviewers have many review devices. They are using these
13 devices frequently to review apps, and so they need support
14 day in and day out to make sure they can do their job in an
15 effective, efficient way.

16 **Q.** Okay. And now I'd like to see if we can give the Court a
17 sense of the scale of the work that your team does. And we
18 have another demonstrative that will help us walk through
19 that.

20 The first entry here is "81 different languages." Could
21 you explain that for the Court?

22 **A.** Yeah. I think this is -- out of all of this, this is
23 maybe my most proud statistic. We have 81 languages natively
24 represented within App Review. It is an incredibly diverse
25 team. We need to be incredibly diverse. We see apps from

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1 developers all over the world created in all kinds of
2 languages. And so certainly we have an incredible team of not
3 just diverse languages but diverse background and skillsets.

4 Within this group, you have folks from engineers. We have
5 teachers. We have lawyers. We have all kinds of different
6 background. We have folks that took a break from a particular
7 career and raised kids and then came back, and you need these
8 types of perspectives to do this in an efficient manner in a
9 way that is sensitive to all the cultural sensitivities and
10 all of the types of concerns that our customers could have.
11 And so this number, I think, is my favorite on this.

12 Scale within terms of submissions, there is around a
13 hundred thousand average App Store submissions per week. This
14 is focused on the iOS App Store, that number. And then there
15 is five -- around 500 human experts within App Review.

16 **Q.** And, Mr. Kosmyнка, do the reviewers on your team work ten
17 hours every day? Does every reviewer work ten hours every
18 day?

19 **A.** No.

20 **Q.** Does the time vary that reviewers work?

21 **A.** It does. We have two primary review facilities. We have
22 one in California here and we have another in Cork, Ireland.

23 Cork, Ireland, our reviewers work eight hours a day, and
24 that is a salaried position.

25 In California, that varies between eight hours to ten

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1 hours. We offer something called FlexForce for additional
2 overtime in the event that there is a surge of apps, and folks
3 could work up to twelve hours, but this is always something
4 where we work with our various HR partners worldwide to make
5 sure that we're doing the best and the right thing for -- for
6 our people.

7 **Q.** I'd like to ask you to turn to PX2790 in your binder. I
8 believe this document has already been admitted.

9 The date on it is 3/19/2021. Do you see that in the upper
10 left corner?

11 **A.** Yes. Yes.

12 **Q.** Is this, Mr. Kosmyнка, the current version of the App
13 Store Review Guidelines?

14 **A.** Yes, it is.

15 **Q.** And does your team use these guidelines during the app
16 review process?

17 **A.** Yes, we do.

18 **Q.** How does your team use them?

19 **A.** The guidelines guide the entire review process. You
20 review apps against the guidelines, so not only is this the
21 guidance that we have as a team on the policies, it's the
22 guidance for the developers, and that's how we communicate
23 with the developers as well, is through the guidelines
24 themselves. When we find an issue, we share the guideline
25 with them, along with our findings.

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1 **Q.** What is the purpose, Mr. Kosmynka, of App Review?

2 **A.** So I think I'm a huge beneficiary of a long history of the
3 vision that the App Store started with. It's codified here in
4 the guidelines. When I have, say, all-hands or any
5 cross-functional meeting, when I'm talking to my team directly
6 and I want to communicate the vision and the mission and what
7 the purpose of App Review is, I simply take this language from
8 the guidelines and put that at the beginning of the deck
9 because this is the purpose. We want to make sure that the
10 App Store is a great place for customers to find safe and
11 trusted apps and a great opportunity for all developers.
12 That's the entire mission.

13 **Q.** And if we could have a blowout of the first sentence under
14 "introduction." Is this the sentence you were referring to,
15 Mr. Kosmynka?

16 **A.** Yeah. "The guiding principle of the App Store is simple.
17 We want to provide a safe experience for users to get apps and
18 a great opportunity for all developers to be successful."

19 **Q.** I'd like to walk through a few of the guidelines and give
20 the Court a sense of the type of app submissions that end up
21 being rejected because they don't comply with that guideline.
22 And let's start first with Guideline 1.1 on safety. It's
23 "Objectionable Content."

24 And the language here is, "Apps should not include content
25 that is offensive, insensitive, upsetting, intended to

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1 disgust, in exceptionally poor taste or just plain creepy."

2 Mr. Kosmynka, can you explain to us -- give us a couple of
3 examples of app submissions that have had to be rejected for
4 failure to comply with this guideline?

5 **A.** This guideline gets applied frequently. Some, I think,
6 notable disturbing examples, we had an app named Paca Girls.
7 What Paca Girls had as far as content was women in what looked
8 to be compromised positions and appeared as though it was a
9 rape scene, and this was something that would have been
10 rejected for 1.1.

11 **Q.** And, Mr. Kosmynka, can computer analysis alone identify
12 objectionable content of that type?

13 **A.** No.

14 **Q.** Mr. Kosmynka, let's take a look at Guideline 1.3. This is
15 "Safety in the Kids Category." And you'll see here, "The Kids
16 Category is a great way for people to easily find apps that
17 are designed for children. If you want to participate in the
18 Kids Category, you should focus on creating a great experience
19 specifically for younger users."

20 What type of submissions have you had to reject as a
21 result of this guideline?

22 **A.** So we've had to reject -- there was a trend of apps that
23 were plastic surgery games marketed towards children, and so
24 this was demeaning to women but also I think manipulative to
25 children and terribly offensive.

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1 Somebody with three daughters, this is a guideline that
2 I'm pretty proud of and something that when we see examples
3 like the plastic surgery targeted towards kids, I'm happy that
4 we apply this.

5 **Q.** Can computer analysis, the automated tools that Apple has
6 developed, alone identify things like that that violate the
7 Kids Category guideline?

8 **A.** No.

9 **Q.** Let's look at Guideline 1.4 on "Physical Harm."

10 "If your app behaves in a way that risks physical harm, we
11 may reject it."

12 Can you give us an example of something you've had to
13 reject as a result of this guideline?

14 **A.** Yes. From time to time, we see apps, and there's one
15 particular that's coming to mind. I think it was called
16 Challenge App, and what Challenge App did was it paid folks to
17 participate in a dare challenge, and when we reject this, what
18 we noticed was that one of the dares was daring someone to
19 jump off a bridge and video it. So we rejected the app. The
20 developer tried to make adjustments over time, but ultimately
21 the app was -- is not available on the store.

22 We've seen other examples of this app on Google Play as
23 well where the video previews there show that in one of the
24 videos, you can see a woman putting whip cream on her chest as
25 a dare. This is a video on the marketing page. In the second

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1 image, you can see a male with an inflated condom over his
2 head, which I think could also risk some pretty serious
3 physical harm. And so that's -- that's an example that this
4 guideline is applicable to.

5 **Q.** And, Mr. Kosmyнка, the app that you're referencing, is it
6 currently available on Google Play? Have you seen it on
7 Google Play?

8 **A.** Yeah. I would have to check again, but I recall recently
9 looking at that, and it was still available.

10 **Q.** Do you recall the name of the company that developed that
11 app?

12 **A.** I believe it was Eristica.

13 **Q.** And have you heard of something called the Coalition for
14 App Fairness?

15 **A.** Yes.

16 **Q.** Do you know whether or not that company, Eristica, I think
17 you said, is a member of the Coalition of App Fairness?

18 **A.** I do recall reading that they were part of this coalition.

19 **Q.** Let's look at a guideline on "Performance," 2.3.1. And
20 the language here is "Don't include any hidden, dormant, or
21 undocumented features in your app. Your apps functionality
22 should be clear to end users and App Review."

23 What types of submissions have you had to reject as a
24 result of that guideline?

25 **A.** This guideline is particularly challenging because if it's

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1 hidden, it's hard for us -- hard for us to find it, so we'll
2 often have to find this post review.

3 But we're here today because of an example of a hidden,
4 dormant, undocumented feature, and so we do see developers
5 implement things that they enable server side, and so in that
6 case, it's not dormant in the app. It's something they have
7 introduced dynamically post review, and we can call it a
8 hotfix, but we see many examples where it's used for
9 incredibly malicious things. Entire concept changes.

10 So, if you will, as a way of example, imagine a benign app
11 that looks like it's for managing wallpapers and it then
12 changes to a gambling casino or a -- a pornography site and
13 it's a complete concept change post review.

14 **Q.** And, Mr. Kosmynka, let's look at Guideline 4.1. This is
15 on copycats. It's on page 14 of the guidelines. And the
16 language here is "Come up with your own ideas. We know you
17 have them so make yours come to life. Don't simply copy the
18 latest popular app on the App Store."

19 Can you give us examples of rejections you've had to make
20 as a result of that guideline?

21 **A.** Yes. I think the -- I don't know individual examples, but
22 the examples are broad in terms of the numbers of apps and
23 developers that attempt to abuse the App Store and other
24 developers by being a copycat.

25 So notably I can think of cases where developers have

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1 submitted free V-Bucks for *Fortnite*. *Fortnite* wallpaper, get
2 free V-Bucks. There is hundreds of these examples where a
3 developer has tried to capitalize on the name of "Fortnite,"
4 and, in addition to that, trick customers into thinking that
5 there is some official affiliation with that and that they're
6 going to get some type of reward. So this would have been
7 rejected as a 4.1 copycat.

8 The same exists for things like Spotify, Headspace. These
9 are popular apps that developers that are bad actors attempt
10 to leverage their popularity and their names and submit
11 hundreds upon hundreds of apps that steal their artwork, their
12 screenshots, their icons, their names. This is absolutely a
13 game of whack-a-mole, but we do so as proactively as possible,
14 and we react swiftly if we do find an example of a copycat
15 that is, you know, making it a less exciting opportunity for
16 our great developers.

17 **Q.** Thank you, Mr. Kosmynka.

18 And then let's look at Guideline 5.1 with respect to
19 "Privacy." In that first sentence we see, "Protecting user
20 privacy is paramount in the Apple ecosystem." And there are
21 several subsections here.

22 If we go down to 5.1.1(ii), "Permissible" -- I'm sorry --
23 "Permission Apps," we have "Apps that collect user or usage
24 data must secure user content for the collection even if such
25 data is considered to be anonymous at the time of or

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1 immediately following collection."

2 Can you give us examples of what you have had to reject as
3 a result of that guideline?

4 **A.** This is a pretty common rejection. There is many apps
5 that try to request too much information or information that
6 is irrelevant to their core functionality, and when they do
7 request it for legitimate needs, we want to make sure that
8 customers are getting both transparency and they've provided
9 consent.

10 And so in order to have informed transparency, you need to
11 describe to a customer why you need this data, what's the
12 customer value in the end, and we call this a -- it's a
13 purpose string, so if you use contacts or an app access as
14 contacts on your phone or background location, you will see a
15 prompt. We have all seen these prompts. And you have an
16 opportunity to say "Yes, allow" or "Don't allow," and there is
17 text on that screen that -- in the dialogue that the developer
18 is responsible for providing. So we will see developers leave
19 that completely empty. We will see them say that they are
20 going to use it for advertising or they're going to sell the
21 data, which wouldn't be appropriate in these cases. And then
22 we'll see that they've put very little effort into changing
23 the description. It looks like it's clearly a template that
24 is not going to make any sense to an end customer.

25 So our human beings, when they see this during app review,

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1 if it doesn't make sense to them, it's certainly going to
2 result in a rejection.

3 **Q.** Thank you.

4 I'd like you to address another privacy provision, and
5 this one is in iii, "Data Minimization."

6 "Apps should only request access to data relevant to the
7 core functionality of the app and should only collect and use
8 data that is required to accomplish the relevant task."

9 Could you explain the types of submissions that end up
10 getting rejected as a result of this guideline.

11 **A.** Yes. So if an app -- some apps require access to photos
12 because they are a photo library tool. If you're an app whose
13 only need for photos is to add a profile image to the user's
14 profile, you would not need full access to the photo library.

15 And so we have an API that the developer can call which is a
16 process picker. They can select a single photo, and if we see
17 that a developer is requesting excess permission in that case
18 access to all photos, we'll let them know that this is a data
19 minimization issue, and there's a more optimal path that
20 protects customer privacy.

21 **Q.** And finally, Mr. Kosmynka, could you look at iv, "Access."

22 "Apps must respect the user's permission settings and not
23 attempt to manipulate, trick, or force people to consent to
24 unnecessary data access."

25 What type of submissions end up getting rejected as a

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1 result of that guideline?

2 **A.** There is a few things that we see here. Developers will
3 hold users hostage and require that they provide consent
4 before they will have the app provide the functionality that,
5 say, the user paid for. That would be an issue.

6 We'll see that they will implement a pre-prompt before our
7 dialogue that conditions the user to answering the -- the
8 consent prompt in the way that the developer would prefer.

9 We'll see that when that dialogue prompts, they will put
10 flashing arrows all around the "okay" button or the "allow"
11 button as a way to condition the user to providing a quick
12 permission.

13 And then we'll see cases where the developer will actually
14 completely replace our dialogue, build their own dialogue that
15 looks identical, and in the event that the user says no, that
16 they will continue to nag the user repeatedly until they say
17 yes, at which point they will then prompt our dialogue, and
18 the user will have then been conditioned, like "I just said
19 'yes.' I'm going to say it again."

20 So these are the types of manipulation that we'll see and
21 we'll reject for.

22 **Q.** Thank you, Mr. Kosmynka.

23 And for these privacy issues and, in fact, for all of the
24 issues that you've given us examples of, do you believe that
25 the computer automated tools alone can address those issues?

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1 **A.** No.

2 **Q.** Mr. Kosmyнка, do you enforce some of the guidelines more
3 aggressively than others?

4 **A.** I wouldn't refer to it as aggressively. I think we have a
5 rigorous review process, and we enforce all of the guidelines
6 with that rigor. So we could say that we aggressively enforce
7 our guidelines, period, but I think that we've -- we have the
8 five pillars within the guidelines, and I think that from
9 our -- our perspective within App Review, they all matter.

10 And if we see an issue, we are going to work with the
11 developer to address the issue, regardless of where within the
12 guidelines that issue falls.

13 **Q.** Thank you.

14 Your Honor, I'd like to approach the witness just to get
15 the plaintiff's exhibit binder back.

16 **THE COURT:** All right. That's fine.

17 **BY MS. MOYÉ:**

18 **Q.** Mr. Kosmyнка, Epic's counsel asked you some questions
19 about whether the guidelines related to the requirement that
20 developers use in-app purchase for digital content -- whether
21 that guideline was implemented aggressively. Do you recall
22 that line of questioning?

23 **A.** I do.

24 **Q.** I'd like you to take a look -- I'm going to bring it back
25 to you -- at PX300, which was introduced into evidence

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1 yesterday, but there were no questions about it. And I'd like
2 you to specifically look at page 6, PX300.6.

3 I'm going to bring the binder back, Your Honor, if that's
4 acceptable.

5 **THE COURT:** You may.

6 **BY MS. MOYÉ:**

7 **Q.** Would you explain, Mr. Kosmynka, what this page shows?

8 **A.** This is the breakdown of the rejections for the week
9 through May 6th, 2017.

10 **Q.** And can you tell us, in looking at this chart, were the
11 rejections for violations of 3.1.1, that's the in-app
12 purchase -- were those the primary rejections that were made?

13 **A.** No.

14 **Q.** Thank you, Mr. Kosmynka.

15 Let's talk about the app review process itself.

16 We have developed a simple demonstrative that we think
17 will help to walk through that and make it clear for the
18 Court.

19 The first question that I have, though, Mr. Kosmynka, is
20 when developers submit their apps for review, do they actually
21 submit their source code?

22 **A.** No. They submit an iOS package.

23 **Q.** And, Mr. Kosmynka, could you tell us -- and you can use
24 the chart, to the extent it's helpful to you -- what is the
25 first set of analyses that are done after a developer submits

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1 their app for review?

2 **A.** When an app is submitted, it goes through an incredibly
3 complex workflow system. I can't, like, begin to do that
4 justice by describing it here. But there is incredibly
5 important steps within that process that pertain to app
6 review.

7 So the workflow process does all kinds of optimizations
8 for customers and our developers, and there is thousands upon
9 thousands of tasks there. But there is portions of those
10 tasks specific to app review, and we refer to those as Static
11 and Dynamic Analysis.

12 **Q.** Okay. First let's define "Static Analysis." What is
13 static analysis?

14 **A.** Static analysis is binary analysis. It is analyzing the
15 compiled binary and the package that the developer has
16 submitted to Apple without actually executing the binary.
17 It's not being run at this point.

18 **Q.** And to be sure being we are being clear for the Court,
19 what exactly is the binary?

20 **A.** The binary is the compiled software. The machines
21 understands the binary whereas the source code human beings
22 would understand.

23 **Q.** And dynamic analysis, can you tell us how that differs
24 from static analysis?

25 **A.** Dynamic analysis we are actually executing the binary. We

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1 are running it.

2 **Q.** We mentioned tools yesterday. Are there tools that are
3 used during the static analysis phase?

4 **A.** Yeah. There is many tools.

5 **Q.** And are those tools developed by Apple?

6 **A.** Yes.

7 **Q.** If we could have on the demonstrative the tools related to
8 static analysis.

9 I would just like to walk through a really high-level
10 overview of those tools with you, Mr. Kosmynka.

11 And, first, each of these tools that's on the -- on our
12 demonstrative here, DX App Analyzer, Apple Similarity, Z
13 Strings, App Transparency, are each of those tools
14 independently developed by Apple?

15 **A.** Yes. These are actually all independent, and they're
16 developed by different teams within Apple even.

17 **Q.** And are all of them maintained in confidence?

18 **A.** Yes.

19 **Q.** Starting first -- and with that in mind, Mr. Kosmynka,
20 give us just an overview of what happens with the DT App
21 Analyzer Tool.

22 **A.** So DT App Analyzer scans the developer's submission and
23 will inform us of frameworks that the app uses, classes, and
24 methods that the app has available to it. At this point, we
25 would not know if those are executed or simply present in the

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1 app. That's -- that's what that does.

2 **Q.** What about App Similarity? What does that tool do?

3 **A.** So App Similarity will look at the machine language of the
4 app and provide a signature, and that signature will be used
5 as a way to find whether or not there are clones of this
6 particular binary moving forward but also presently, and so
7 that's a tool that helps us with copycat rejections.

8 **Q.** Z Strings?

9 **A.** So if you were to look at a compiled binary, there are
10 cases where a developer has had variables that are strings,
11 and those strings include things like URLs, IP addresses,
12 information that could also be used to link and identify
13 potential malicious behavior.

14 **Q.** And let's turn to dynamic analysis. And we see here the
15 tool App Transparency again. Could you explain why that is,
16 sir?

17 **A.** So App Transparency I believe sits really in between
18 static and dynamic analysis. It provides us a very similar
19 output, in fact, I think the same output that DT App Analyzer
20 provides, but in addition to statically analyzing the binary,
21 it also is doing some dynamic analysis or forced execution, if
22 you will, to resolve call paths so that we can get a better
23 understanding of whether or not there is obfuscated API calls
24 and they may be having hid methods or classes that would have
25 otherwise statically been undetectable.

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1 **Q.** And the Mercury tool.

2 **A.** Mercury is a grid of devices that is actually -- I think
3 we have over 2,000 devices in this that is running iOS apps on
4 physical iPhones, physical iPads. Both static and dynamic
5 analysis work together to grab facts about the submission such
6 that we can inform our tools and inform our reviewers.

7 **Q.** And what types of devices are used to run dynamic
8 analysis?

9 **A.** iPads, iPhones, and then we would have Macs that
10 orchestrate this.

11 **Q.** I think we actually have a demonstrative that would help
12 display the dynamic analysis. If we could have the next one.

13 What do we see here, Mr. Kosmynka?

14 **A.** So this is one of the racks in one of our data centers
15 that shows the Mercury infrastructure, so you can see here we
16 have actually had custom -- custom cages built for such
17 devices. And the Macs on the top are performing the
18 orchestration in connecting to overall App Store
19 infrastructure to drive this process. And these devices would
20 be running 24/7 to, upon submission, exercise an app in an
21 automated fashion.

22 **Q.** Thank you, Mr. Kosmynka.

23 And during the static/dynamic analysis phase, are you
24 looking for links to malicious websites?

25 **A.** So within static and dynamic analysis, I mentioned

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1 Z Strings has the capability of extracting URLs that we can
2 find statically in the binary. Mercury, when it executes and
3 launches the app and attempts to navigate an app, there are
4 URLs discovered there. So these two facts from static and
5 dynamic analysis coalesce into a single set of facts which
6 gives us URLs, and we can then absolutely take known bad-actor
7 URLs and look to see if that is potentially present or
8 executed within apps.

9 **THE COURT:** So can I ask, back on this one, you said
10 that all of these are running 24 hours a day, 7 days a week?

11 **THE WITNESS:** Yes, Your Honor.

12 **THE COURT:** And how many devices total?

13 **THE WITNESS:** Over 2,000.

14 **THE COURT:** And someone has then submitted the apps
15 to these devices to run, and then do they generate reports, or
16 how does that work?

17 **THE WITNESS:** So the developer has submitted to App
18 Store connector portal, and as part of that ingestion process,
19 as part of preparing it for app review, it will run on this.
20 So the developer has not submitted directly to these devices.
21 It's part of the overall app review analysis. And we would
22 produce reports and information, facts, that we run rules on
23 later to determine if any of those facts are a signal of the
24 potential issue.

25 **THE COURT:** Okay. Thank you.

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1 **BY MS. MOYÉ:**

2 **Q.** And during this static/dynamic analysis phase,
3 Mr. Kosmynka, are you also looking for cloned apps?

4 **A.** Yes.

5 **Q.** What about private APIs? There was some reference to that
6 yesterday. Let's first make sure it's clear.

7 What does API stand for?

8 **A.** Application Programming Interface.

9 **Q.** And what is a private API?

10 **A.** So a private API is -- I would refer to it as an
11 undocumented API. The intention of the API is not to have it
12 used in third-party developer apps at this point.

13 **Q.** And to whom is it private?

14 **A.** To Apple.

15 **Q.** And in the static/dynamic analysis phase, is there a -- an
16 examination to see if private APIs are being used?

17 **A.** Yes. DT App Analyzer would inform us whether there was
18 private APIs. When I say "us" here, I am referring to Apple,
19 not App Review. And then we would try to tell the developer
20 that as early in the process as possible so if the developer
21 has done the right thing and happened to unintentionally
22 implement a private API or maybe even intentionally but they
23 didn't hide it, then we can tell them that right -- when they
24 submit, we can warn them and say there is a private API
25 present, and that in itself is not a human process. There is

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1 human process because we have to define what's private, but
2 it's meant to provide the developer with immediate feedback
3 and not have to wait for an app review.

4 If the developer has hid private API access, obfuscated
5 it, tried to hide it from review, then additionally our App
6 Review tools have transparency in this case, would let App
7 Review know that such that my team would be able to use that
8 fact and take the appropriate action on the app.

9 **Q.** Thank you, Mr. Kosmynka.

10 Is the terminology "entitlement issues" used within Apple?

11 **A.** Yes. Certainly we have a wide range of entitlements, and
12 there are frequently issues with third-party apps and their
13 entitlement requests.

14 **Q.** And what is an entitlement request?

15 **A.** So an entitlement gives an app a particular permission to
16 a set of resources or APIs on the -- on the device on the
17 user's device.

18 **Q.** And is there a look for potential entitlement issues
19 during the static and dynamic analysis phase?

20 **A.** Yeah. In both, and then in the human review phase as
21 well. What I can say, as like way of an example, if, say, a
22 social networking app wanted to access health records, they
23 would need to include the HealthKit entitlement, and if they
24 did not, then those API calls to health records would not
25 function as they would expect. And so that would be an issue.

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1 And so if they were to submit, our static analysis would
2 be able to say you're calling these APIs, but you don't have
3 the entitlement, that will not work. And so that would be one
4 class of an issue.

5 Another class of the issue is the opposite, actually, in
6 which they are -- have the entitlement present but they have
7 not called the APIs. And so in the case of HealthKit, this is
8 a concern because if the entitlement is present in an app that
9 is conceptually likely not doing good things with HealthKit,
10 this could be a signal to us that there's potential abuse in
11 the future. We wouldn't want to open our customers up to
12 that, and so we would say you need to drop the entitlement,
13 even though there is no API calls because they potentially
14 could introduce that dynamically post review, and we wouldn't
15 want to take the risk.

16 There are certain entitlements in APIs that also need a
17 permission prompt, a TCC prompt we call them, and so I
18 mentioned earlier in the Privacy Guideline that if the user's
19 or developer's justification or explanation as to why they
20 need HealthKit, why they need health records access is, you
21 know, not accurate, not meaningful, and not reasonable within
22 the guidelines and in the point of the view of the consumer,
23 we would reject that as well. So those are examples of
24 entitlement issues.

25 **Q.** Mr. Kosmynka, let me back up and ask, why is it a concern

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1 whether there are private APIs being employed by a developer?

2 **A.** So I think developers build all kinds of APIs. As a
3 developer myself, I built all kind of APIs that I never
4 intended for anyone else to use. They were for myself, for my
5 app, and I'm not testing them, verifying them, certifying them
6 and ensuring that they're going to work and be stable moving
7 forward.

8 And so in the sense of a private API, it may have had a
9 particular purpose inside of Apple and there was no intention
10 for that to become at that point something available to -- to
11 developers because of stability, quality, reliability, not
12 only for the customers, but for the developer experience.

13 **Q.** Thank you, Mr. Kosmynka.

14 So after the static and dynamic analysis phase -- maybe we
15 can go back to our demonstrative -- what's the next step in
16 the App Review process?

17 **A.** So I mentioned that there is facts that are gathered here.
18 These facts we move into MOZART. The last three letters of
19 MOZART, ART stands for App Review Tools. Our vision of this
20 was that it would it be kind of the canonical source of truth
21 for apps facts that pertain to App Review.

22 So all these facts gather into MOZART. And within MOZART,
23 we also have a rules engine. And so the rules engine allows
24 us to codified scenarios that we have seen historically,
25 whether that be malware and other safety and privacy concerns

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1 such that we can take proactive action when one of these facts
2 trips one of those types of rules.

3 **Q.** And is MOZART also a computer analysis tool developed by
4 Apple?

5 **A.** Yes, it is. And I would go beyond tool. It's a very
6 complex and evolved system.

7 **Q.** Thank you.

8 And what is the next step in the review process?

9 **A.** So the next step would be human review. Magellan is the
10 tool name here. Think of this as a desktop app. It's a Mac
11 desktop app, and it's the control and orchestration center for
12 a reviewer. If you would ask a reviewer, their tool is
13 Magellan.

14 **Q.** We have another demonstrative here that may help you
15 explain what happens during the human review phase. Can you
16 explain what we see here, Mr. Kosmynka?

17 **A.** Yeah. This looks like a specialist's setup for review.
18 This specialist, given the arcade icon on these screens,
19 likely has the appropriate skill and training to review arcade
20 apps.

21 On the right, you can see that tvOS is launched so they
22 have the skill to review tvOS apps. And there is -- I count
23 five iOS devices on this. I don't see a watch, but this would
24 be quite an involved setup for a specialist that's trained on
25 all types of app review scenarios.

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1 The Mac that they have -- the iMac or the MacBook, that
2 would probably be their primary review device. And so all of
3 these devices would be connected to their primary review
4 device, and they would inspect the metadata and the app
5 history all within the Mac app, and they would orchestrate the
6 installation and the actual app review itself on these
7 peripheral iOS devices and tvOS devices.

8 **THE COURT:** And so you provide apples at the front
9 door for everybody to grab for their staff?

10 **THE WITNESS:** No. And I think that picture was too
11 cute.

12 **THE COURT:** I was thinking that was a little bit too
13 contrite --

14 **THE WITNESS:** No. We asked for a photo, and this is
15 the one we found.

16 **THE COURT:** Yeah. Okay. At least we're on the same
17 page with respect to the apple.

18 Go ahead.

19 **MS. MOYÉ:** Thank you, Your Honor.

20 **Q.** During the human review phase, is there additional review
21 for entitlement issues?

22 **A.** Yes.

23 **Q.** And during the human review phase, is there additional
24 review for offensive content?

25 **A.** Yes.

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1 **Q.** Are there new threats that are detected during the human
2 review phase?

3 **A.** Absolutely.

4 **Q.** Can you give us an example of some new threats that have
5 been detected as a result of human review?

6 **A.** Yeah. I think with the 81 languages, I mean, I -- me
7 personally, I am not able to keep track of what is going on
8 worldwide in all cultures and understand that, but with 81
9 languages, the team does a good job of understanding risks and
10 concerns across the world.

11 A few years ago, I recall it was a -- kind of a social
12 media campaign, I believe. I think it was like the Blue Whale
13 Campaign in which there was something trending on social media
14 encouraging folks to commit suicide, and this -- the like kind
15 of lightning rod for this call to action was a blue whale
16 meme, and the team was aware of this and proactively used
17 tools and human review to find blue whale apps, and in any
18 type of current event, we see developers trying to exploit
19 that event and submit to app review, so not only are we able
20 to keep up on current things that are trending with respect to
21 technology but also cultural events around the entire world.

22 **Q.** And, Mr. Kosmyinka, are there omissions issues related to
23 hidden code that are detected during human review?

24 **A.** Yes.

25 **Q.** Can you give us an example of that?

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1 **A.** Yeah. I think this is honestly amazing. The team that
2 reviews apps, each and every day they see a lot of apps, a lot
3 of scenarios. They are familiar with the history of these
4 apps, the history of the rejections. They're also familiar
5 with -- when they send an app to Technical Investigations and
6 Technical Investigations finds something, they familiarize
7 themselves with the patterns.

8 And so in the case of an app that switches from a
9 wallpaper app to a full-blown pornography website, they're
10 aware of the icon and the imagery that that wallpaper app had.
11 They are aware of the call to actions of the keywords and the
12 marketing texts that that app had. And so they're astute
13 enough to find similar apps that are tools are not capable of
14 detecting that are attempting to do the same thing. And so
15 not only is there things that they see personally that are
16 clearly offensive, clearly a rejection, they're also able to
17 astutely know that there is a potential concern in these apps,
18 and they send them to TI, and more often than not, they are
19 able to verify it.

20 **Q.** Is information gathered from human review used to make any
21 form of adjustments to the tools that we've discussed?

22 **A.** Yes. Every day. So one of these examples -- I can give a
23 specific one. I mentioned the pornography, but we also have
24 cases where apps bait and switch to illegal gambling, so there
25 are certain coins or like fish. A Clownfish will be a signal

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1 that there is potential illegal gambling in a particular app.
2 You combine those with a series of things, and so when the
3 reviewer escalates that to our ARC team or App Store
4 Improvements Team and our Technical Investigation Group, we're
5 able to not only look at that signal, but we can see that
6 those apps happen to call similar URLs and so we can then
7 codify that into a rule to potentially proactively detect
8 those, route them away from the team, the Core Team directly
9 to our ARC team and our TI team such that they can do the
10 upfront technical investigation, and more often than not,
11 those result in a termination.

12 **Q.** And does the human review process, in your view, provide
13 any assistance to developers?

14 **A.** Yes. We are within developer relations, and I think that
15 is a really important notion.

16 When I joined Apple and started working with the App
17 Review Team, we had this phrase -- this is when I was an
18 engineering manager. The phrase was, "Let's get them to yes."
19 Let's try to figure out how to work with the developer within
20 the construct of the guidelines and try to get great apps to
21 the store. And so in order to do that, we have to be a
22 customer support organization. We're a developer support
23 organization.

24 And so we've worked with -- I think like last year, a
25 150,000 developers submitted a new app to the store for the

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1 first time. It's a jaw dropping number. Those developers
2 would have not had any familiarity with the guidelines and the
3 process, and there is a human being on the end of every
4 rejection. The developer can respond to us. We can respond
5 back to them. We call them. They can call us as well.

6 These are things that I think the Developer Relations
7 Organization and where we sit tells that story, but I'm happy
8 to tell it very specifically.

9 **Q.** Thank you, Mr. Kosmynka.

10 And can you tell us how long does it take to complete the
11 app review process?

12 **A.** So it varies. Our goal and our promise that we've made to
13 developers is that we complete a review for your app -- 50
14 percent of apps within 24 hours. We refer to this as our SLA,
15 our Service Level Agreement. And so this is something that
16 we've submitted committed to them at WWC. We committed to
17 them in the guidelines themselves on developer.apple.com. So
18 50 percent in 24 hours, 90 percent within 48 hours. And then
19 the individual review, once a reviewer is tasked with the
20 review of that app, that varies widely based on the complexity
21 of the app.

22 **Q.** You were asked some questions about the average time it
23 takes --

24 **THE COURT:** So you said that was your promise. But
25 is that what you've delivered?

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1 **THE WITNESS:** Absolutely. The SLA today as of this
2 morning was 96 percent within 24 hours.

3 **THE COURT:** Proceed.

4 **BY MS. FORREST:**

5 **Q.** You mentioned the time an individual reviewer takes to
6 complete review, and there was questioning about that
7 yesterday.

8 Do you believe the average amount of time it takes
9 individual reviewers to complete the process is a meaningful
10 number?

11 **A.** No. I think you can take the average, and that means
12 something mathematically, but apps are so different,
13 developers have creative ideas that are entirely different.
14 Some apps take hours to review. Other apps take less than a
15 minute to review. A lot of our app submissions are updates,
16 and the functionality that is in those apps have been
17 previously reviewed. Some apps are submitted in a response to
18 a rejection, and the thing that we're looking at at that point
19 is did the developer resolve the issue. And so that's a
20 different length of review.

21 Some apps are complex role-playing games that have a
22 30-minute video trailer, and while that's painful for the
23 reviewer sometimes because they don't -- they've got to wait
24 for the whole thing before they can proceed with the review,
25 we do it, and that's just a review that takes a little longer.

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1 **Q.** And in going back to the Court's question about the SLA
2 over time -- if we could take a look at Exhibit DX4374. I
3 believe this was admitted yesterday. And if you'd look at
4 page 8 of that document. It has "iOS App Processing SLAs By
5 Week through November 16th, 2019." Would you explain those
6 numbers for the Court.

7 **A.** So this is the same presentation that includes all of our
8 SLA numbers and our rejection numbers. This is a week of
9 data. And here we're looking at the average -- average SLA,
10 our 24 hour SLA, and our two-day, 48-hour SLA for the various
11 days within that period, and then the average.

12 So the average in this period by week through
13 November 16th, 2019 -- the average for 24 hours was 89.8
14 percent, and the average for our 48-hour SLA was 96.6 percent.

15 **Q.** Thank you.

16 And, Mr. Kosmynka, have the number of app submissions
17 changed over time?

18 **A.** Yes.

19 **Q.** And how have they changed?

20 **A.** I think it's generally grown.

21 **Q.** And what has been Apple's response to that increase?

22 **A.** Apple's response to app review has been ongoing
23 investments and resources, not just within our own
24 organization, but cross-functionally across all the
25 organizations that support this process and support the store.

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1 So we've only had to get better in terms of resourcing and
2 efficiency and quality given those numbers.

3 **Q.** And I'd like to ask you to look at PX0335 in your binder.

4 The cover email is from you to a Mr. Ricardo Cortes. This is
5 dated September 30, 2015. Would you take a look at that
6 document and identify what it is for the Court.

7 **A.** This document is a presentation for a program, not a
8 software program. This is a project, I guess, is a better way
9 to describe it that we called Columbus, and the purpose of
10 Columbus was to heavily invest in app review automation and
11 efficiency.

12 **Q.** And if you would look at page 6, I believe it is, of that
13 document. There's a slide that discusses goals. Can you
14 explain what's being conveyed here?

15 **A.** Yeah. The goals of Columbus -- at this time I was
16 managing the -- the engineering, the Tools Team, and we had a
17 vision for how to improve tools in the overall process of app
18 review, and our goal was to reduce the number of manual
19 reviews, reduce the developer perceived review time. And what
20 that means, if your app is rejected and you continue to get
21 rejected because you're unable to resolve the issue, the
22 perceived review time for a developer is actually from the
23 initial submission to the point until they're approved, so
24 it's not just to make sure we review the app faster, it's also
25 to give them the support they need as well. And improved

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1 consistency and quality.

2 **Q.** Mr. Kosmynka, I neglected to ask, is this a presentation
3 that you prepared?

4 **A.** Yes.

5 **Q.** And who did you present it to?

6 **A.** This presentation made it to a number of cross-functional
7 executives. I think the email said I was sending the
8 presentation to my manager in case I lost it, and what that
9 tells me here is that this was either a presentation to Eddy
10 Cue, Phil Schiller or both. This presentation made it to all
11 of the above.

12 **Q.** And can you take a look at the document, and I believe it
13 is page 42 of the document. That's not the right page, so let
14 me try again.

15 If you could flip through it, Mr. Kosmynka, and find the
16 slide that you believe represents the changes you suggested in
17 your presentation.

18 **A.** Apologies. I'm unable to find this document in my binder.

19 **MS. MOYÉ:** May I approach the witness, Your Honor?

20 **THE COURT:** You may.

21 **THE WITNESS:** Yeah. I can see this. The number on
22 the bottom is -- it ends with 0142.

23 **BY MS. MOYÉ:**

24 **Q.** What is the caption?

25 **A.** The caption is "Tracks."

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1 **Q.** Thank you. Thank you, Mr. Kosmynka.

2 Can you explain what the recommendations were you were
3 making here?

4 **A.** Yeah. So this aligns nicely with those goals we talked
5 about a slide ago. Goal was to reduce manual review and
6 reduce review time. In order to do this, we needed to
7 investigate or invest in additional automation and
8 validations. This was the rule engine that I discussed with
9 MOZART. All of this would feed into a concept we call
10 "assisted review." It is dependent on human beings, but we
11 provide human beings with important information and facts such
12 that they can make more accurate and more efficient decisions,
13 and then overall tool efficiency was a heavy investment.

14 One of the bottlenecks of reviewing an app is actually
15 installing and launching the app, and so investing in
16 something to improve that, which we did, improves app review,
17 improves the performance, improves the SLA, and makes the job
18 of reviewing apps even more enjoyable.

19 **Q.** Thank you.

20 **THE COURT:** So this was 2015.

21 **THE WITNESS:** That's correct.

22 **THE COURT:** This is six years later.

23 **THE WITNESS:** Yeah. This program still exists.

24 **THE COURT:** So what has changed in the last six
25 years?

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1 **THE WITNESS:** We have implemented the vast majority
2 of the ideas and initiatives within this. Additionally,
3 the -- there's -- there's additional things, so in this
4 particular presentation, we have binary similarity and binary
5 analysis. We now do computer vision on images and icons. We
6 do file analysis beyond just what is in the binary.

7 Binaries in the package that a developer sends to us may
8 have configuration filings, JavaScript files, instructions for
9 how the app should behave. We analyze this as well.

10 The tool I think in this particular presentation, we were
11 on Magellan 1. It hadn't launched yet. It had launched in
12 2016. I believe we were on Magellan 3 at this point working
13 towards Magellan 4. I believe Magellan 2 was a complete
14 rewrite of Magellan 1. And MOZART itself, our system that we
15 rely on to conduct these reviews, has become more performant,
16 more thorough, and has tremendously assisted in our ability to
17 hold to the SLA.

18 **THE COURT:** Do you have an understanding of how much
19 economically was invested to get you where you are today
20 versus 2015?

21 **THE WITNESS:** No, I do not. I think this is a
22 difficult question for us to answer because in order to pull
23 anything off in this presentation, we needed cross-functional
24 help beyond just my particular engineering team, so while in
25 this, I think we grew the team by 20 engineers. Those

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1 engineers were largely focused on MOZART itself, which is data
2 base and services and search, and a number of the engineers
3 were focused on binary analysis, a number were focused on the
4 desktop app. We would have had hundreds of folks across the
5 company helping to do this, and across the company in
6 completely different organizations.

7 App Transparency is a tool that we introduced post --
8 after this. And App Transparency exists in our security
9 organization. Our fraud organizations, which are not within
10 App Review, help with app review and discovery abuse. They're
11 not reviewing the apps, but we rely on their tools,
12 algorithms, etc., and so I think it's part of how we do
13 business. It's a critical part of what we do.

14 The app ingest process, the effort to get a TestFlight
15 beta app to a tester, the effort to get an iOS app to a
16 customer through the App Store, all of that is a precursor to
17 performing a review of an app, and it's all bundled into just
18 how this stuff works. So very hard to answer.

19 **THE COURT:** Proceed.

20 **MS. MOYÉ:** Thank you, Your Honor.

21 May I approach the witness just to get the binder back?

22 **THE COURT:** You may.

23 **BY MS. MOYÉ:**

24 **Q.** Mr. Kosmynka, to prepare for your testimony today, did you
25 compile data on the rejection rate for app submissions in

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1 2020?

2 **A.** We do have the rejection rate for submissions in 2020,
3 yes.

4 **Q.** If we could see the next demonstrative. I think it's 13.

5 And can you explain to the Court what was the rejection
6 rate in 2020?

7 **A.** It's around 40 percent.

8 **Q.** And we looked earlier at data from earlier time periods
9 where the rejection rate varied from 33 to, I think it was, 36
10 percent.

11 Why do you believe the rejection rate has increased?

12 **A.** I think the deep analysis has provided facts that we would
13 have otherwise not been able to see, so our systems have
14 improved. And I think also that the Review Team itself
15 continues to improve. So the signals that the reviewers have
16 identified that feed back into the system, it results in
17 similar issues not being encountered again by customers, and
18 so that results in more rejections. And so if we are to be
19 more consistent and have higher quality in order to do that,
20 we need to ensure that we're catching things the first time
21 around and that we're making sure they're compliant and that
22 the impact is more rejections.

23 **Q.** And the presentation that you talked about, your 2015
24 presentation, do you believe the investment made as a result
25 of that had an impact on this rejection rate?

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1 **A.** Yes.

2 **Q.** How many app submissions were rejected for a privacy
3 guideline violations in 2020, Mr. Kosmynka?

4 **A.** 215,000.

5 **Q.** And how many were rejected for privacy violations in 2019?

6 **A.** I believe it was 150,000.

7 **Q.** And how many app submissions -- submissions of new apps
8 were rejected overall in 2020?

9 **A.** I think that was a million in 2020.

10 **Q.** And in 2020, how many rejections were there for app
11 updates?

12 **A.** I believe that was another million.

13 **Q.** Were new developers able to get their apps submitted and
14 on the App Store in 2020?

15 **A.** Yes.

16 **Q.** And do you have a number of how many?

17 **A.** I said previously that we worked with 150,000 developers
18 that for the first time were submitting an app to the App
19 Store. A large number of those would have made it to the
20 store, but also that one million new apps that were rejected,
21 the vast majority of those make it to the store as well. As I
22 said, we're a developer relations organization. Our goal is
23 to work with developers and resolve issues, and so in the case
24 of some privacy guideline violations, if it's not clear and
25 transparent and makes sense to the customer, that would be a

KOSMYNKA - CROSS RESUMED - MOYÉ

1 rejection, but we work with the developer to make sure that
2 they have the resources to resolve the issues. And so I would
3 say the majority of those do end up making it to the store
4 compliant after they heard our feedback and made adjustments.

5 **Q.** Okay. And then I want to talk about what happens post
6 approval. Do you sometimes learn that there are apps in the
7 store that don't meet the guidelines, notwithstanding your
8 efforts in the app review process?

9 **A.** Yes.

10 **Q.** And how do you learn that?

11 **A.** We learn it through a variety of ways. Customers can
12 report it to us through AppleCare in the -- report a concern,
13 report a problem flow through iTunes and the App Store. We
14 also learn it through watching social media and watching the
15 news, PR, and our customers happen to also email executives,
16 and so we'll see those types of emails as well. And we take
17 them all with the same level of seriousness.

18 **Q.** Do any of your tools, your automated tools, monitor for
19 problematic apps?

20 **A.** They do.

21 **Q.** Which tools, sir?

22 **A.** One of the tools that does this is Mercury. It's that
23 grid of iOS devices exercising apps.

24 **Q.** What happens when a problem app is brought to your
25 attention?

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1 **A.** So the team will investigate the app. This is our ARC
2 Team, App Review Compliance. They will investigate the app.
3 If the concerns are substantiated, if we have determined that
4 it is indeed in violation of the guidelines, depending on what
5 the violation is -- if it's something like child exploitation
6 and child pornography, it's obviously an immediate removal of
7 the app. If the concern happens to be a minor bug with the
8 app, the developer could have 14 days to resolve the issue.
9 And we'll send them a written message with the rejection. And
10 they can resolve -- resolve that issue.

11 We also see reports of some of those apps with hidden
12 functionality, and so it's clear to us that this is not just
13 an isolated case, that there will be additional apps like
14 this. And so we'll work with our Technical Investigations
15 Team to do what we call signal collection where we go and find
16 facts and then see if those facts match up to other apps on
17 the store.

18 One example of this is we had a report of an app that was
19 collecting location data and sending that location data to
20 data brokers without user consent. And so by looking at the
21 app, doing signal collection, we could track this back to a
22 third-party developer SDK that was behaving in this manner,
23 and we could find all of the apps that happened to have that
24 SDK. We could let the developers of those apps know that this
25 is what their app is doing, how it is behaving, and that they

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1 need to resolve it.

2 So people, signal investigation, and then using the tools
3 to assist us in having the most efficient, high quality impact
4 we can have for our customers.

5 **Q.** Thank you.

6 Mr. Kosmynka, I have been given a note that I need to move
7 PX335 into evidence.

8 **THE COURT:** Any objection?

9 **MS. MOSKOWITZ:** Pardon me? No objection, Your Honor.

10 **THE COURT:** It's admitted. The first one of the day.

11 (Plaintiff's Exhibit 335 received in evidence)

12 **BY MS. MOYÉ:**

13 **Q.** Mr. Kosmynka, do you believe Apple is unique in its
14 ability to review iOS apps?

15 **A.** Yes.

16 **Q.** Can you explain why?

17 **A.** I think from a competitive standpoint, the App Store is
18 regarded as the safest and trusted app store. The review
19 process itself is regarded as rigorous. And then from just
20 focusing on iOS itself, I'm not sure how we would do this
21 without Apple employees, Apple investment and infrastructure.

22 Simple things. For example iOS 14.5 released recently.
23 In order to support that, we needed to update all of our
24 infrastructure, all of our tools in addition to the App Store
25 itself. This is a highly coordinated effort. We have Launch

KOSMYNKA - CROSS RESUMED - MOYÉ

1 Teams within App Review entirely focused on the features
2 within iOS 14.5. Our App Tracking Transparency. We had
3 training sessions for the reviewers and all of the
4 relationship managers worldwide to make sure that they prepare
5 developers for these changes. I don't know how you do that
6 without Apple doing it for Apple's App Store.

7 **Q.** Does Apple's specialized knowledge of the iPhones
8 hardware, the iPad's hardware, enhance its ability to conduct
9 app review?

10 **A.** Yes.

11 **Q.** What about its knowledge of the iOS system itself? Does
12 that enhance its ability to conduct app review?

13 **A.** Absolutely.

14 **Q.** Do you believe third parties could do just as good a job
15 with app review as your team at Apple?

16 **A.** No.

17 **Q.** Can you explain why not?

18 **A.** As I mentioned, I think there's other companies that also
19 have app stores, and the example we shared today of an app
20 that is on their store with human review, that app would not
21 be on our store.

22 **Q.** Does the app review process benefit consumers in your
23 view, Mr. Kosmynka?

24 **A.** Yes.

25 **Q.** Can you explain why that is?

KOSMYNKA - CROSS RESUMED - MOYÉ

1 **A.** I think consumers appreciate that an Apple employee has
2 installed and run an app --

3 **MS. MOSKOWITZ:** Your Honor, basis for testimony,
4 foundation.

5 **THE COURT:** Sustained.

6 **BY MS. MOYÉ:**

7 **Q.** Is the app review process intended to benefit consumers,
8 Mr. Kosmynka?

9 **A.** Yes. As we stated in the beginning of the guideline, the
10 vision behind the App Store, our mission, is to make sure it's
11 a great place for customers to get great apps.

12 **Q.** Is the app review process intended to benefit developers
13 as well?

14 **A.** Yes. Similarly in that introduction, we state that it's a
15 great opportunity for all developers.

16 **Q.** Epic has alleged in this case that Apple's app review
17 process is a sham, a pretext, that it doesn't improve
18 security, and it's only designed to protect Apple's monopoly.
19 What is your reaction to that allegation, Mr. Kosmynka?

20 **A.** I think it neglects the two million apps that we rejected
21 and improved the experience for our customers in 2020, so I
22 definitely take offense to it being a sham.

23 I also think in the case of an unverified hotfix, the app
24 review re-review process took the appropriate actions to make
25 sure that that app is no longer on the store, not in

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1 compliance with the rules.

2 **Q.** Thank you, Mr. Kosmynka. I will pass the witness.

3 **THE COURT:** All right. Plaintiff's exam.

4 **MS. MOSKOWITZ:** Your Honor, if you will just bear
5 with me, I have to get a few more materials over here.

6 **THE COURT:** That's fine.

7 **REDIRECT EXAMINATION**

8 **BY MS. MOSKOWITZ:**

9 **Q.** Good morning, Mr. Kosmynka.

10 **A.** Good morning.

11 **Q.** I just want to circle back to a couple of things that you
12 covered with your counsel.

13 You mentioned Snapchat and bunny ears in response to the
14 judge's question, and I wasn't really sure whether I caught
15 it, whether you thought that was a game or not.

16 **A.** No. I don't think it's a game.

17 **Q.** Okay. And TikTok, you're familiar with TikTok?

18 **A.** Yes.

19 **Q.** And that has challenges in them from time to time?

20 **A.** I believe they do have some challenges, yes.

21 **Q.** Is TikTok a game?

22 **A.** TikTok itself is not a game.

23 **Q.** Are the challenges within TikTok games?

24 **A.** I would have to look, but I believe TikTok's compliant
25 with our 4.7 rules.

KOSMYNKA - REDIRECT - MOSKOWITZ

1 **Q.** Separate question. Just asking if you're familiar with
2 the challenges and whether you consider the challenges within
3 TikTok a game.

4 **A.** I'm not personally familiar. I haven't used these
5 challenges in TikTok.

6 **Q.** Circling back to Roblox then, which we talked about
7 yesterday and then again today, you mentioned your kids play
8 Roblox?

9 **A.** My kids do not play Roblox.

10 **Q.** They play *Minecraft*?

11 **A.** *Minecraft*.

12 **Q.** Apologies.

13 And with respect to Roblox, you mentioned certain
14 experiences that can occur within Roblox; right?

15 **A.** That's right.

16 **Q.** And are those -- are you familiar with Roblox? Have you
17 played within Roblox?

18 **A.** I have installed Roblox and have used it, yes.

19 **Q.** So with respect to the experiences within Roblox, are
20 those occurring within a 3D or three-dimensional world?

21 **A.** I believe the experience I tried was, yes.

22 **Q.** And does Roblox users have three dimensional avatars?

23 **A.** Yes.

24 **Q.** Are you familiar with whether Roblox has held concerts
25 within Roblox?

KOSMYNKA - REDIRECT - MOSKOWITZ

1 **A.** I am not.

2 **Q.** Have you heard the term Metaverse?

3 **A.** Yes.

4 **Q.** Is Roblox a Metaverse-style experience?

5 **A.** I'm not an expert within the term Metaverse.

6 **Q.** How do you define it?

7 **A.** How do I define it?

8 **Q.** Yeah.

9 **A.** I think that I would have to speculate on Metaverse. I've
10 heard the term, but it's not something that I'm comfortable
11 defining.

12 **Q.** Understanding that you cannot define it, what is your
13 general understanding of the term as it's used?

14 **A.** As it's used, I think --

15 **MS. MOYÉ:** Objection. Speculation.

16 **THE COURT:** He can testify as to his own
17 understanding.

18 **THE WITNESS:** So my own understanding of the
19 Metaverse is a -- kind of think of it like a virtual world
20 where you go with your particular character and are with
21 players that you know, players you may not know, and you
22 navigate around that Metaverse, which could include additional
23 worlds in various experiences.

24 **BY MS. MOSKOWITZ:**

25 **Q.** And so with respect to Roblox -- again, just using your

KOSMYNKA - REDIRECT - MOSKOWITZ

1 understanding -- you mentioned that Roblox does allow
2 individuals to gather and hang out, I think was the word you
3 used, with their friends; right?

4 **A.** I believe so, yeah.

5 **Q.** And that's one aspect of the Metaverse understanding that
6 you have?

7 **A.** I think that's one aspect of it, yes.

8 **Q.** And Roblox allows users to navigate around worlds?

9 **A.** I believe so.

10 **Q.** And so that was also part of your understanding of
11 Metaverse?

12 **A.** Yes.

13 **Q.** Are you familiar with *Fortnite*, Mr. Kosmynka?

14 **A.** Yes.

15 **Q.** Have you participated in a *Fortnite* experience?

16 **A.** I have.

17 **Q.** Have you attended any of *Fortnite's* concerts?

18 **A.** I have not.

19 **Q.** And *Fortnite* is a virtual world where you go with a
20 character?

21 **A.** I wouldn't refer to *Fortnite* as a world.

22 **Q.** *Fortnite* has world -- an island where individuals can go?

23 **A.** I -- I have always looked at *Fortnite* as a game. I don't
24 think of it as a world.

25 **Q.** And are you familiar with *Battle Royale*?

KOSMYNKA - REDIRECT - MOSKOWITZ

1 **A.** Yes.

2 **Q.** Is that what you're thinking of?

3 **A.** Yeah.

4 **Q.** Have you ever gone to *Party Royale*?

5 **A.** No.

6 **Q.** Have you ever done creative mode in *Fortnite*?

7 **A.** No.

8 **Q.** Are you familiar with what creative mode is?

9 **A.** No.

10 **Q.** Are you familiar with what *Party Royale*?

11 **A.** No.

12 **Q.** Are you aware that *Fortnite* holds concerts?

13 **A.** Yes.

14 **Q.** Are you aware that *Fortnite* screens movies?

15 **A.** No.

16 **Q.** Are you aware that individuals can go into a completely
17 separate aspect of *Fortnite*, separate from *Battle Royale*, and
18 hang out with their friends?

19 **A.** No.

20 **Q.** You discussed IAP a bit with your counsel just in the
21 prior hour or so. Do you recall that testimony?

22 **A.** Yes.

23 **Q.** And you were asked about Exhibit 300, PX300. Do you still
24 have that in front of you, Mr. Kosmynka, which is in evidence?

25 **A.** Yes, I do.

KOSMYNKA - REDIRECT - MOSKOWITZ

1 **Q.** Thank you.

2 If you could go back to PX300.6, which is page 6. You
3 were asked, Mr. Kosmynka, about the 3.1.1 rejections; is that
4 right?

5 **A.** That's right.

6 **Q.** You were asked if that was -- I think the word was
7 "primary" -- reason for rejections; is that right?

8 **A.** That's right.

9 **Q.** You said it was not the primary reason; right?

10 **A.** I believe I said it was not a primary reason.

11 **Q.** Okay. It was one of the top ten reasons; right?

12 **A.** It's on our top ten rejected list, right.

13 **Q.** So out of all of the reasons for apps being rejected for
14 all of your guidelines, Guideline 3.1.1 was one of the top ten
15 reasons why apps were rejected for this week; right?

16 **A.** Yes.

17 **Q.** Sellers of physical goods are not required to use IAP for
18 in-app purchase; correct?

19 **A.** They're not required to use IAP for the sale of physical
20 goods.

21 **Q.** Right. Understood.

22 And do you recall a time where Uber and Lyft were
23 launching membership subscriptions?

24 **A.** I do.

25 **Q.** And Uber and Lyft, separate from a subscription when

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1 they're just offering individual rides, this that is a
2 purchase or a transaction that does not require IAP; correct?

3 **A.** That is a physical service, yes. No IAP.

4 **Q.** And when they were going to be offering membership
5 subscriptions, there was discussion within Apple as to whether
6 to impose an IAP requirement and a commission; right?

7 **A.** I wouldn't look at it that way.

8 **Q.** Okay. There was a time where Apple considered imposing an
9 IAP requirement on Uber and Lyft to offer membership
10 subscriptions to their users; correct?

11 **A.** There was discussion with -- around Uber and Lyft as to
12 whether their subscription would need to use IAP.

13 **Q.** And if it were required to use IAP, it would also call for
14 a 30 percent commission or 15 percent thereafter?

15 **A.** It would be -- our standard commission would apply.

16 **Q.** Right. Any app that is required to use IAP gets the
17 standard applicable commission?

18 **A.** Yes.

19 **MS. MOSKOWITZ:** I have a new binder that I can hand
20 to the Court and to Mr. Kosmynka.

21 Your Honor, may I approach?

22 **THE COURT:** You may.

23 **BY MS. MOSKOWITZ:**

24 **Q.** Mr. Kosmynka, if you could turn to PX2235 for
25 identification.

KOSMYNKA - REDIRECT - MOSKOWITZ

1 **MS. MOYÉ:** I'm sorry. I don't have that document.

2 **MS. FORREST:** It should be in there.

3 **MS. MOYÉ:** 2235?

4 **THE WITNESS:** I do not see a 2235 in this binder.

5 **THE COURT:** I have it. Look after 2114.

6 **MS. MOYÉ:** I found it.

7 **MS. MOSKOWITZ:** Okay. False alarm.

8 **Q.** Mr. Kosmynka, would you like some help?

9 **THE COURT:** It's towards the back. It's the fourth

10 to the back, I think.

11 **THE WITNESS:** Thank you, Your Honor.

12 **BY MS. MOSKOWITZ:**

13 **Q.** You've got it?

14 **A.** Yeah.

15 **Q.** Great.

16 This is an email from you to ERB team. Do you see that?

17 **A.** I do see this, yes.

18 **Q.** And this is an email from you to an ERB team email address

19 sent on October 31, 2018; correct?

20 **A.** That's correct.

21 **MS. MOSKOWITZ:** Your Honor, I will offer PX2235 into

22 evidence.

23 **THE COURT:** No objection?

24 **MS. MOYÉ:** Yes. Objection as to the hearsay

25 components, Your Honor. It includes communications from third

KOSMYNKA - REDIRECT - MOSKOWITZ

1 parties.

2 **THE COURT:** It's admitted with the same note as
3 always. Those portions will be admitted under the rules or at
4 least considered under the federal rules. Go ahead.

5 (Plaintiff's Exhibit 2235 received in evidence)

6 **MS. MOSKOWITZ:** Thank you, Your Honor. Just to be
7 clear, the bottom email is from an Apple employee. There is
8 one small reference to a *Verge* article on the bottom.

9 **THE COURT:** Again, as always, I don't have a chance
10 to look at the details. It's a four-page document. When I
11 consider it, I will operate in terms of its admissibility --

12 **MS. MOSKOWITZ:** Thank you, Your Honor.

13 **THE COURT:** -- consistent with the federal rules.

14 Go ahead.

15 **MS. MOSKOWITZ:** Understood.

16 **Q.** Mr. Kosmynka, this email is an email you received
17 discussing Uber's launch of a membership subscription without
18 IAP and with no prior communication to Apple; right?

19 **A.** Yes.

20 **Q.** Do you recall this incident?

21 **A.** I do not.

22 **Q.** Do you know whether Apple decided whether or not to
23 require IAP for membership subscriptions for Uber and Lyft,
24 etc.?

25 **A.** I think the majority of those membership subscriptions are

KOSMYNKA - REDIRECT - MOSKOWITZ

1 physical services so no IAP is required.

2 **Q.** And you believe the reason why no IAP is required is
3 because they're physical services? That's your basis for
4 thinking that?

5 **A.** Yes.

6 **Q.** And were you involved in the discussions as to whether IAP
7 requirements should be imposed on those subscriptions?

8 **A.** Yes.

9 **Q.** And are you aware that there are other aspects to
10 subscriptions for those memberships that are not involving
11 physical goods or services being transferred?

12 **A.** No.

13 **Q.** You mention -- you were asked a bit about private IAPs,
14 and I just want to be clear on what is a private IAP and what
15 is not a private IAP.

16 A push notification is not a private IAP; right?

17 **A.** No.

18 **Q.** And ARKit is not a private IAP; right?

19 **A.** No.

20 **Q.** What about Siri Search. That is an IAP that you can use
21 for a native app; right?

22 **A.** Developers can integrate with Siri Search, yes.

23 **Q.** And that is not a private IAP?

24 **A.** Not to my knowledge.

25 **Q.** Just making sure since I think I asked an inartful

KOSMYNKA - REDIRECT - MOSKOWITZ

1 question, push notifications are not a private IAP?

2 **A.** PushKit which powers push notifications I believe is
3 public.

4 **Q.** You talked about the App Store Improvements Program in
5 your prior testimony?

6 **A.** That's right.

7 **Q.** And that's sometimes referred to, I think you said, ASI in
8 that demonstrative?

9 **A.** That's right.

10 **Q.** That started approximately five years ago in 2016; right?

11 **A.** Yes.

12 **Q.** That is not a new, recent effort?

13 **A.** That's an ongoing effort, but it started in 2016.

14 **Q.** If you could please turn to PX326 marked for
15 identification.

16 Sir, this is an email that you received on November 21,
17 2019; correct?

18 **A.** Correct.

19 **MS. MOSKOWITZ:** Your Honor, I offer PX326 into
20 evidence.

21 **THE COURT:** Any objection?

22 **MS. MOYÉ:** No objection.

23 **BY MS. MOSKOWITZ:**

24 **Q.** And this is a reference in here to the same App Store
25 Improvements Program we were just discussing?

KOSMYNKA - REDIRECT - MOSKOWITZ

1 **THE COURT:** It's admitted.

2 **MS. MOSKOWITZ:** I'm so sorry, Your Honor. Apologies.

3 (Plaintiff's Exhibit 326 received in evidence)

4 **THE COURT:** Go ahead.

5 **BY MS. MOSKOWITZ:**

6 **Q.** Is this a reference to the same App Store Improvements
7 Program we were just discussing?

8 **A.** Yes, it is.

9 **Q.** Do you recall generally your testimony about the fraction
10 or rate of bad apps getting through app review?

11 **A.** Yes.

12 **Q.** I'm going to ask you to turn -- do you still have the
13 other binder that your counsel gave you in front of you?

14 **A.** I do not.

15 **Q.** Okay.

16 May I ask counsel to give it back to me so I can give it
17 to him.

18 **THE COURT:** You should have it. Don't you?

19 **MS. MOYÉ:** I think he actually has it.

20 **THE WITNESS:** Sorry. Yes, I do.

21 **BY MS. MOSKOWITZ:**

22 **Q.** If you could turn to DX4399 that is in that binder.

23 **A.** I have the document.

24 **Q.** Thank you.

25 What is this document?

KOSMYNKA - REDIRECT - MOSKOWITZ

1 **A.** This looks like an App Store business or App Store program
2 update.

3 **Q.** And is a portion of that document that addresses app
4 review; right?

5 **A.** Yes.

6 **Q.** And this is from 2017?

7 **A.** I believe so, yes.

8 **Q.** If you could turn to page 4399.064. You are there?

9 **A.** I'm here.

10 **Q.** And so 2017 is about a year or so into the App Store
11 Improvements Program?

12 **A.** Yes.

13 **Q.** And on this slide, DX4399.064, there's a reference to
14 400,000-plus apps removed; right?

15 **A.** That's right.

16 **Q.** And that's removed pursuant to the App Store Improvement
17 Program?

18 **A.** That's right.

19 **Q.** And so already one year in, Apple had removed 400,000 or
20 more apps as part of the App Store Improvement Program?

21 **A.** Yes.

22 **Q.** And those were all apps that had made it through app
23 review and were currently on the App Store?

24 **A.** Yes.

25 **Q.** You presented a demonstrative during your counsel's

KOSMYNKA - REDIRECT - MOSKOWITZ

1 questioning that showed the portion of 2020 app submissions
2 that have been approved and rejected. Do you remember that?

3 **A.** I do.

4 **Q.** Okay. Can we please put the slide 13 from counsel's
5 presentation up on the screen, please.

6 **THE COURT:** This is Demo 13?

7 **MS. MOSKOWITZ:** That's right, Your Honor.

8 **Q.** And this is the slide we were just talking about?

9 **A.** Yes.

10 **THE COURT:** I take it you don't want 4399 in
11 evidence?

12 **MS. MOSKOWITZ:** No, Your Honor.

13 **THE COURT:** Okay.

14 **BY MS. MOSKOWITZ:**

15 **Q.** The information on this slide is suggesting that for the
16 2020 app submissions, 40 percent were rejected; right?

17 **A.** Yes.

18 **Q.** And you gave an estimate of overall that was about 2
19 million apps rejected?

20 **A.** Yes.

21 **MS. MOSKOWITZ:** Your Honor, I received a note that I
22 would indeed like to admit DX4399 into evidence.

23 **THE COURT:** Okay. No objection?

24 **MS. MOYÉ:** No objection.

25 **THE COURT:** 4399 is admitted.

KOSMYNKA - REDIRECT - MOSKOWITZ

(Defense Exhibit 4399 received in evidence)

BY MS. MOSKOWITZ:

Q. And so what I didn't think you gave us was the overall number of submissions for 2020. Do you have that?

A. Not off the top of my head.

Q. So you know the number of rejections but you don't know the number of approvals or overall submissions?

A. No. I have a range.

Q. Okay. Is it around the average of 4.9 million along the lines of the last three years before?

A. No. I think we were up to over 7 million.

Q. Over 7 million. So 2 million -- is that 40 percent of 7 million?

A. So in the case of the large sum, an app would be, if it was submitted multiple times -- let's say it was submitted this week, and they failed to resolve the issue, submitted again a month later, and they were continuing. That would be multiple rejections.

Q. And multiple submissions?

A. Multiple submissions, yes.

Q. Okay. So, again, we have 2 million rejections for one time and multiple submissions included; right?

A. Yeah. But also on the second half of that 2 million, the 1 million for updates, that also would have been apps that were live on the store.

KOSMYNKA - REDIRECT - MOSKOWITZ

1 **Q.** All I'm trying to figure out is just the math.

2 You said that 2 million total apps went through app review
3 in 2020 and got a rejection X next to it; right?

4 **A.** Yes. But the -- the updates that were rejected that may
5 not have been a submission to app review, that may have been a
6 live app so it would not have been rejected in the hundred
7 thousand per week submissions that we get.

8 **Q.** So, in other words, they are or they are not in the 40
9 percent?

10 **A.** I think you would have to look at those 2 million
11 differently because it's including re-review tasks that would
12 not be in the overall 7 million submission number.

13 **Q.** So if you look at the overall submission number, the
14 number of rejections is much lower than 40 percent?

15 **A.** No. I don't believe it is.

16 **Q.** What do you believe it is?

17 **A.** I believe that our number of submissions that we get per
18 week and the number of rejections that we get per week, if you
19 look at that average, was 40 percent for 2020. I think that
20 the 2 million that I was referencing earlier, 1 million of
21 that was new submissions and another million of that was a
22 culmination of both updates that were submitted but also live
23 apps that we discovered through our automation or social
24 listening, escalations, etc., and that would not have counted
25 as a submission in that weekly submission number. It also

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1 would not have counted as a submission in the 7 --
2 approximately 7 million I quoted earlier.

3 **Q.** Okay. So I'm still -- and this could be my fault. I
4 just -- I'm not getting the numbers.

5 So what is different about what you're counting in the
6 7 million number and what you're including in the 40 percent?

7 **A.** My apologies. When an app is submitted for review and we
8 get on that, the slides we looked at earlier, the statistics,
9 there is roughly a hundred thousand iOS submissions per week,
10 there is roughly a 40 percent rejection rate for those
11 submissions. Of the total actions that we took in 2020, some
12 of those actions were on a submission and some of those
13 actions were as a result of us finding an issue with a live
14 app. And so I don't believe we can take at least one of that
15 million and use it as a way to determine whether the 40
16 percent is accurate or not. They're separate numbers for
17 separate things.

18 **Q.** Okay. So I should completely ignore that discussion about
19 what that other million was. So now I just want to talk about
20 what the 40 percent is here on this slide.

21 **A.** Yeah. Let's talk about the 40 percent.

22 **Q.** Okay. Let's talk about that.

23 What are you saying is included in the 40 percent?

24 **A.** This summary was based on all of the apps submitted to app
25 review in 2020 thus far and the percentage of that that was

KOSMYNKA - REDIRECT - MOSKOWITZ

1 rejected.

2 **Q.** Okay. And you're saying that so if I do the math, it's
3 about 2.8 million?

4 **A.** I'm not sure where you get that math.

5 **Q.** Doing 40 percent of 7 million.

6 **A.** That sounds about right.

7 **Q.** Okay. So there's more complicated math that I'm going to
8 now have to do in my head, but let's try.

9 So you're not saying, of course, on this slide that the
10 215,000 rejections for privacy guideline violations explains
11 the 40 percent; right?

12 **A.** No. This is an example of things that would have been in
13 the 40 percent.

14 **Q.** Okay. So the guideline privacy guideline violations there
15 are a subset of the red 40 percent of rejections?

16 **A.** That's right.

17 **Q.** And so we're talking about 215,000 out of 7 million apps
18 submitted were rejected for privacy guideline violations?

19 **A.** Roughly.

20 **Q.** Two to three percent overall?

21 **A.** It sounds right.

22 **Q.** Let's just talk about the privacy guideline violations a
23 little bit further.

24 So that guideline violation I think you talked about on
25 your testimony with your counsel was referring to Section 5.1

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1 of the guidelines; is that right?

2 **A.** I believe so.

3 **Q.** If you could turn to PX56 in evidence.

4 **THE COURT:** You have about two minutes.

5 **MS. MOSKOWITZ:** Thank you, Your Honor.

6 **THE WITNESS:** I see the guideline.

7 **BY MS. MOSKOWITZ:**

8 **Q.** If you could turn to PX56.19.

9 **A.** Okay.

10 **Q.** And there you find Guideline 5.1 on privacy; right?

11 **A.** Yes.

12 **Q.** Okay. And everything underneath 5.1 constitutes a privacy
13 guideline?

14 **A.** Yes.

15 **Q.** Including 5.1.1, "Data Collection and Storage"; right?

16 **A.** Yes.

17 **Q.** And romanette i underneath that is called "Privacy
18 Policies"; right?

19 **A.** Yes.

20 **Q.** It says that "All apps must include a link to their
21 privacy policy in the App Store Connect Metadata Field and
22 within the app in an easily accessible manner"; correct?

23 **A.** Correct.

24 **Q.** And it goes on to say what that information has to
25 provide; right?

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1 **A.** That's right.

2 **Q.** So an app can be rejected based on its failure to include
3 that link to their privacy policy; right?

4 **A.** Yes.

5 **Q.** They might have the policy; they just omitted the link?

6 **A.** The link now is not possible to be omitted because this is
7 something that is checked at the submission process.

8 **Q.** Okay. But that has not always been the case; right?

9 **A.** That's right.

10 **Q.** Okay. And so before it was the case, apps could have been
11 rejected for just failing to include the link; right?

12 **A.** That's right.

13 **Q.** That would have been a privacy violation?

14 **A.** Yes.

15 **Q.** And you can't tell us in any given year in any of these
16 data that you've looked at what proportion of the privacy
17 guideline violations are for that individual guideline?

18 **A.** Not today. I don't have that number.

19 **MS. MOSKOWITZ:** Good breaking point, Your Honor.

20 **THE COURT:** All right. We'll stand in recess then
21 for 20 minutes. Thank you.

22 **MS. MOSKOWITZ:** Thank you.

23 **THE COURT:** Before I go, Ms. Forrest, when you were
24 not here, I did compliment your leadership and that of
25 opposing counsel and your clients for the diversity that we

1 have seen on these teams. It is much appreciated.

2 **MS. FORREST:** Thank you, Your Honor.

3 (Recess taken at 10:16 a.m.)

4 (Proceedings resumed at 10:36 a.m.)

5 **THE COURT:** We are back on the record. The record
6 will reflect that the parties are present, the witness is on
7 the stand.

8 You may proceed.

9 **BY MS. MOSKOWITZ:**

10 **Q.** Mr. Kosmyнка, you talked earlier about SLAs; do you recall
11 that?

12 **A.** Yes.

13 **Q.** And that refers to the length of time that your processes
14 for app review would take place?

15 **A.** It refers to what a developer should expect with respect
16 to how long an app will go through review.

17 **Q.** If you could please turn to PX442 for identification.

18 **A.** I see it.

19 **Q.** This is an email from you to Shaan Pruden and others on
20 February 14th, 2018, correct?

21 **A.** Yes.

22 **Q.** And this is an email discussing the anticipated release of
23 *Fortnite* on iOS?

24 **A.** Yes.

25 **MS. MOSKOWITZ:** Your Honor, I offer PX442 into

1 evidence.

2 **THE COURT:** Any objection?

3 **MS. MOYE:** No objection.

4 **THE COURT:** Admitted.

5 (Plaintiff's Exhibit 442 received in evidence)

6 **BY MS. MOSKOWITZ:**

7 **Q.** Can you go to 442.2 second page there, there's some
8 challenges discussed, right?

9 **A.** Yes.

10 **Q.** And one of them, if you go to end of item one, it says,
11 with the weekly content update cadence, getting stuck in app
12 review is their single biggest concern/risk. Right?

13 **A.** I see this, yes.

14 **Q.** And that's discussing the fact that *Fortnite* is a
15 multiplatform app that releases content on a very frequent
16 basis, that it really needs to understand what the cadence is
17 going to be for app review at Apple, right?

18 **A.** Yes.

19 **Q.** And there is discussion in here that even with the 48-hour
20 SLA, the app review process would be a bottleneck for their
21 entire ecosystem of updates, right?

22 **A.** Yes.

23 **Q.** You can put that aside and please turn to PX446 for
24 identification.

25 **A.** Yes.

1 Q. Have you ever seen this email before?

2 A. I think I'm included earlier in the thread.

3 Q. And it refers to discussions that you had with these
4 individuals, right?

5 A. Yes.

6 Q. And on the first page there's a reference to a three-day
7 meeting with you, right?

8 A. Yes.

9 Q. And there's a discussion again here about not wanting
10 iOS to be the bottleneck for cross-platform developers, but
11 the reality of the situation is we sometimes are that
12 bottleneck, right?

13 A. That's what was wrote here with me off the thread.

14 Q. It continues on: Given the exchange with Trystan and
15 others on this topic, there really isn't anything we can do to
16 change that.

17 Right?

18 A. That's what's written here.

19 MS. MOSKOWITZ: Your Honor, I offer PX446 into
20 evidence.

21 THE COURT: Any objection?

22 MS. MOYE: No objection, Your Honor.

23 THE COURT: It's admitted.

24 (Plaintiff's Exhibit 446 received in evidence)

25

1 **BY MS. MOSKOWITZ:**

2 **Q.** During app review that we've discussed at some length,
3 Apple tries to screen for apps that attempt to scam users,
4 right?

5 **A.** Yes.

6 **Q.** Another word for that type of app might be fraudulent app?

7 **A.** Yeah.

8 **Q.** Fraudulent apps do make it through app review, correct?

9 **A.** Everybody makes mistakes.

10 **Q.** Fraudulent apps do make their way through app review,
11 right?

12 **A.** Yes.

13 **Q.** You were shown on your, I guess, Direct testimony from
14 your counsel PX335.

15 Do you recall that? And would you please turn to it.

16 It's likely in the other binder.

17 **A.** Yes.

18 **Q.** If you can please turn to page 335.6, which is the same
19 page -- one of the same pages your counsel showed you.

20 **A.** Yes.

21 **Q.** This is the goals slide?

22 **A.** Yes.

23 **Q.** And the first item --

24 **MS. MOSKOWITZ:** Your Honor, do you need a moment?

25 **THE COURT:** No.

1 **BY MS. MOSKOWITZ:**

2 **Q.** Say reduce number of manual reviews.

3 Do you see that?

4 **A.** Yes.

5 **Q.** I just want to understand because I don't think you talked
6 about this.

7 Does that mean that there is an effort or a goal to try to
8 move some types of apps into fully automated review?

9 **A.** No.

10 **Q.** What is that referring to?

11 **A.** All apps go through the same review. What this is
12 referring to is, if we can front load an issue to a
13 developer's attention and it doesn't require the human being
14 to do this, it benefits to the privacy policy example is a
15 good one where the machines take care of that initial look for
16 app review.

17 **Q.** So not that you would take the full process and automate
18 it for any apps, but take some aspects of the process that
19 were currently human and see if you can automate it?

20 **A.** Yes, but some apps would not make it to human review if
21 they had issues detected --

22 **Q.** Understood. I am trying to understand what that phrase
23 means.

24 You are saying that some aspects that were currently human
25 aspects of the review would be changed to an automated

1 machine-led review.

2 **A.** Changed or enhanced.

3 **Q.** To an automated review?

4 **A.** Yes.

5 **Q.** The second item is reduce developer perceived review time,
6 right?

7 **A.** Yes.

8 **Q.** And, again, this is reference to the fact that developers
9 perceive the review time as too long, right?

10 **A.** Yes.

11 **Q.** The third item is improve consistency.

12 Do you see that?

13 **A.** Yes.

14 **Q.** And that goes both directions, right? Apps that make it
15 through that shouldn't have and apps that were rejected that
16 should have been approved?

17 **A.** Yes.

18 **Q.** What your counsel did not go through, I don't think, are
19 there are some notes below the slide, speaker notes?

20 **A.** I see them, yes.

21 **Q.** It says, Macs note quote "ton of scam apps in store."

22 Do you see that?

23 **A.** I do.

24 **Q.** If you turn, please, to PX335.8, two pages later.

25 **A.** I see this, yes.

1 Q. This is the top ten rejection reasons, right?

2 A. Yes.

3 Q. The guideline 5.1 for privacy is not on here, right?

4 A. The guidelines changed. There is a privacy guideline here
5 but not 5.1 specifically.,.,.,.,

6 Q. Which one?

7 A. 17.2.

8 Q. And that's two percent?

9 A. Appears that way, yes.

10 Q. That's in line with what we talked about earlier without
11 your demonstrative slide 13?

12 A. Sounds right, yes.

13 Q. If you turn to 335.20.

14 A. Can you repeat the number?

15 Q. Sure. The dot 20. Also referenced ending 138 if you are
16 looking at the Bates number.

17 THE COURT: That's better because our copies don't
18 have that dot reference.

19 MS. MOSKOWITZ: Yes, ending 138.

20 THE WITNESS: Yes.

21 BY MS. MOSKOWITZ:

22 Q. If you look at the speaker notes, again, there, sir, you
23 see a ton of scam apps in store, correct?

24 A. I do.

25 Q. If you turn to the Bates number ending 174, which also for

1 the record is 335.56.

2 **A.** Can you repeat --

3 **Q.** Absolutely. It's the Bates ending 174.

4 **THE COURT:** Bates is the reference to the number on a
5 document.

6 **THE WITNESS:** Thank you.

7 **THE COURT:** I had that quote for jurors.

8 **MS. MOSKOWITZ:** They haven't been deposed, though.

9 **THE WITNESS:** I see this now, ppj.

10 **BY MS. MOSKOWITZ:**

11 **Q.** This is talking about the potential acquisition of Source
12 DNA, right?

13 **A.** That's company

14 **Q.** That's the company you actually did acquire, right?

15 **A.** Apple did acquire Source DNA.

16 **Q.** And you were also, if you look at the next page, also
17 considering at the time potentially acquiring AppThORITY,
18 right?

19 **A.** Yes.

20 **Q.** That's another company that offers dynamic and static
21 analysis tools?

22 **A.** Yes.

23 **MS. MOSKOWITZ:** Your Honor, I offer PX335 into
24 evidence.

25 **THE COURT:** It's already in.

1 **MS. MOSKOWITZ:** Is it?

2 **THE COURT:** Yes.

3 **MS. MOSKOWITZ:** My apologies. Thank you.

4 **BY MS. MOSKOWITZ:**

5 **Q.** If you can please turn to PX2084. If you can turn to
6 2084.

7 **A.** I see the document.

8 **Q.** Thank you. This is an email you received on October 29,
9 2019, correct?

10 **A.** Yes.

11 **Q.** And in 2019, do you recall becoming aware that Wandera,
12 W-A-N-D-E-R-A, a security firm identified 17 apps that load a
13 malicious clicker Trojan model on an iOS device?

14 **A.** I see the article, yes.

15 **Q.** Do you recall becoming aware that the Wandera firm had
16 identified 17 apps with a malicious clicker Trojan module?

17 **A.** I do not.

18 **Q.** Your team investigated the issue, right?

19 **A.** Yes.

20 **Q.** And, these apps did, in fact, contain malicious clicker
21 modules, right?

22 **A.** Yes.

23 **Q.** And a malicious clicker Trojan module means that the app
24 was carrying out ad related, ad fraud related tasks in the
25 background of the app, like continuously opening web pages or

1 clicking links without a user interaction, right?

2 **A.** I'm not sure if the app would be in the background but the
3 activity would have been in the background of the app usage.

4 **Q.** Meaning the activity of opening, clicking on ads, opening
5 pages, that was happening without the user doing anything?

6 **A.** Correct.

7 **Q.** And in addition to doing those activities, those types of
8 Apps can also potentially steal information of users, right?

9 **A.** Potentially.

10 **Q.** If you could turn to page 2084.4. That has a list of the
11 infected apps that Wandera identified.

12 Let me know when you're there.

13 **A.** I see the apps.

14 **Q.** Do you see the second one there called --

15 **MS. MOYE:** This portion is hearsay in the document.

16 **THE COURT:** I could not hear you.

17 **MS. MOYE:** Objection. This potion is hearsay in the
18 document that she's directing the witness to.

19 **THE COURT:** So she's asking a question. Overruled.

20 **BY MS. MOSKOWITZ:**

21 **Q.** Do you see the second app there, is EMI Calculator and
22 Loan Planner?

23 **A.** I do.

24 **Q.** Let's now go back to the first page, 2084.1. There's an
25 email from you on the bottom of that page. Do you see that?

1 **A.** I do.

2 **Q.** And you are discussing in that email the EMI calculator
3 and loan pen operating, right?

4 **A.** Yes.

5 **Q.** And then you say, weird one, it looks like we took it
6 down, it came back to review, two folks ignored the notes, not
7 hard to do that, and approved the app; correct?

8 **A.** Yes.

9 **Q.** And there's a reference to the ARC group being involved?

10 **A.** Yes.

11 **Q.** And that's that same group that used to be called UTB,
12 right?

13 **A.** Yes.

14 **Q.** And so you concluded, going back in the same page after
15 you identify what I just read, you say quote, we are making
16 critical errors.

17 Do you see that?

18 **A.** Yes.

19 **MS. MOSKOWITZ:** Your Honor, I offer into evidence
20 PX2084.

21 **THE COURT:** No objection?

22 **MS. MOYE:** Only objection to the hearsay portions,
23 Your Honor.

24 **THE COURT:** Shall we have a standing note? Do you
25 want to say that every single time or will you all just -- or

1 can I have a standing order that when there is hearsay from a
2 third party in these documents, when I go back to review them
3 and consider them in the context of this case, I will consider
4 them for their proper evidentiary purpose?

5 **MS. MOYE:** Yes, Your Honor --

6 **MS. MOSKOWITZ:** Yes.

7 **MS. MOYE:** -- that is acceptable. Thank you.

8 **THE COURT:** All right. Standing objection on both
9 sides and a standing response.

10 It's admitted.

11 **MS. MOSKOWITZ:** Thank you, Your Honor.

12 (Plaintiff's Exhibit 2084 received in evidence)

13 **BY MS. MOSKOWITZ:**

14 **Q.** You're also aware, are you not, that certain apps on the
15 App Store have scammed users into purchasing subscriptions?

16 **A.** Yes, I'm aware of subscription scams.

17 **Q.** And you're aware of subscription scams that, in fact, make
18 their way through app review, get approved, and get on to the
19 App Store, right?

20 **A.** I'm aware of those mistakes, yes.

21 **Q.** You've described the fact that such apps make it past app
22 review as quote "shocking," right?

23 **A.** Yes.

24 **Q.** If you could please turn to PX2029 for identification.

25 **A.** I can see that.

1 Q. This is an email at the top from you on January 18, 2018,
2 right?

3 A. That's right.

4 Q. And the earliest email is from a non-Apple individual
5 alerting Apple to what they describe as a serious scam that is
6 being perpetrated through the Apple App Store, right?

7 A. Yes.

8 Q. And prior to receiving this email, you were not aware of
9 the scam, right?

10 A. I'm not aware of this email prior to receiving it.

11 Q. Are you aware of the scam -- are you -- do you recall
12 being aware of the scam before receiving this email?

13 A. I don't have a recollection of these apps before this
14 email.

15 Q. And he attaches a PDF that describes in detail how he
16 thinks the scam operates?

17 A. Yes.

18 Q. And you reviewed that PDF slide deck, right?

19 A. I believe so.

20 Q. In fact, you wrote that the contents of the PDF was
21 shocking, right?

22 A. Yes.

23 Q. And you also wrote, we need to think about how to stop
24 this from happening. Right?

25 A. Yes.

1 Q. And stop this means stop apps from scamming users and
2 making hundreds of thousands of dollars through these scams,
3 right?

4 A. Stop apps from scamming users. Yes. I am not aware of
5 how much this app made.

6 Q. It made money?

7 A. I'm not sure.

8 Q. You have no understanding whatsoever as to whether it made
9 any money?

10 A. I don't recall.

11 Q. Are you aware of instances of scams that are not making
12 money?

13 A. Yes.

14 Q. On App Store removals for scams, have you been removing
15 them for doing other things?

16 A. Attempting to scam a user.

17 Q. And to make money off of those users, or to steal their
18 data, or something else?

19 A. All of the above. I think -- I'm making the distinction
20 between whether the scam was successful or not, and actually
21 did make money.

22 Q. Okay. So what you're just saying here is, whether or not
23 they were attempting to make money, you just don't know one
24 way or the other?

25 A. I don't know how successful their scam was.

1 **MS. MOSKOWITZ:** Your Honor, I offer PX2029 into
2 evidence.

3 **THE COURT:** No objection?

4 **MS. MOYE:** No objection.

5 **THE COURT:** It's admitted.

6 (Plaintiff's Exhibit 2029 received in evidence)

7 **BY MS. MOSKOWITZ:**

8 **Q.** After this email, subscription scams continue to make
9 their way onto the App Store to this day, right?

10 **A.** We still find apps in the review process and apps that
11 have gotten through the review process that attempt to
12 manipulate and scam customers.

13 **Q.** And that's true today?

14 **A.** Yes.

15 **Q.** If you could also turn your binder to PX372.

16 **A.** I see the documents.

17 **Q.** That is an email you received on March 7, 2019?

18 **A.** Yes.

19 **Q.** And this is another report from a customer into Apple that
20 gets discussed and circulated within Apple, right?

21 **A.** It's discussed and sent to the ARC team for investigation.

22 **Q.** And the user complaint is detailing a scam where the app
23 darkens the screen's brightness to zero so that you can't read
24 anything, and then an in-app notification to purchase premium
25 membership appears for the low, low price of 89.99.

1 **A.** Yes.

2 **Q.** And that is a charge that went through IAP, right?

3 **A.** I believe so.

4 **Q.** And the email from your colleague to you and to the ARC
5 team says, can you please jump on this? It looks like this
6 could be another Touch ID scam.

7 Right?

8 **A.** That's right.

9 **MS. MOSKOWITZ:** Your Honor, I offer PX372 into
10 evidence.

11 **THE COURT:** No objection?

12 **MS. MOYE:** No objection.

13 **THE COURT:** It's admitted.

14 (Plaintiff's Exhibit 372 received in evidence)

15 **MS. MOSKOWITZ:** Thank you, Your Honor.

16 **BY MS. MOSKOWITZ:**

17 **Q.** If you could please turn to PX371 in your binder.

18 **A.** I have the document.

19 **Q.** This is an email chain from February 6, 2019 in which you
20 participated, right?

21 **A.** Yes.

22 **Q.** And the email in the middle of the page is an email from a
23 developer.

24 Do you see that?

25 **A.** I do.

1 Q. And he's writing to Tim Cook and some others about a
2 highly dangerous app that can lead users with high blood
3 pressure into believing that the blood pressure readings are
4 accurate, right?

5 A. Can you repeat the document number? My apologies. I
6 think I have the wrong one here.

7 THE COURT: I don't have that one.

8 MS. MOSKOWITZ: 371. Okay. Let's see.

9 It may be in that thin binder from yesterday. That might
10 be part of the problem; it didn't make its way in.

11 I will move on and we'll see if we can find it.

12 BY MS. MOSKOWITZ:

13 Q. Do you have PX364 in your binder?

14 This will be PX Bingo until we can get one.

15 THE COURT: So I do have 371 from yesterday.

16 MS. MOSKOWITZ: Okay.

17 Your Honor, may I approach the witness with it?

18 THE COURT: You may.

19 MS. MOSKOWITZ: Thank you.

20 THE COURT: Are you going to go back to 371?

21 MS. MOSKOWITZ: I will do that, Your Honor.

22 BY MS. MOSKOWITZ:

23 Q. Mr. Kosmyuka, do you have PX371?

24 A. I do see it, yes.

25 Q. I was pointing to the middle of the page, an email from a

1 developer.

2 Do you see that?

3 **A.** Yes.

4 **Q.** And the subject line is "fraudulent and life-threatening
5 app"?

6 **A.** I do see this, yes.

7 **Q.** And the developer is complaining that this is an app that
8 could mislead users about their blood presser?

9 **A.** That's right.

10 **Q.** And Mr. Schiller forwards that email on to you, right?

11 **A.** Yes.

12 **Q.** And you report back?

13 **A.** I report back that the app is removed, yes.

14 **Q.** You say it was removed. But you go on to say that there
15 was no evidence of fraudulent IAP, the IAP was set up to
16 remove ads, and was clear to customers what they were getting,
17 right?

18 **A.** That's right.

19 **Q.** So that sentence is saying that they were not violating a
20 number of guidelines, right?

21 **A.** There were some guidelines that they were not violating,
22 correct.

23 **THE COURT:** I did not hear you.

24 **THE WITNESS:** Sorry, Your Honor. There were
25 guidelines they were not violating.

1 **BY THE WITNESS:**

2 **Q.** But you went on to say, the app is still nonsense and
3 should not be on the store, right?

4 **A.** That's right.

5 **Q.** What guideline is that a reference to?

6 **A.** I think what I would have been referring to here is that
7 the app promises functionality and it's not actually possible
8 on our devices with accuracy. And so in that case, now we
9 actually have a guideline specifically that calls out blood
10 pressure monitoring without specific hardware; something that
11 would be a violation.

12 **Q.** And this app made its way through AppThORITY, right?

13 **A.** That's right.

14 **Q.** Now let's go to PX364, please in your binder.

15 **THE COURT:** Are you going to offer 371?

16 **MS. MOSKOWITZ:** Yes, I am Your Honor.

17 **THE COURT:** No objection?

18 **MS. MOYE:** No objection.

19 **THE COURT:** 371 is admitted.

20 **MS. MOSKOWITZ:** Thank you.

21 (Plaintiff's Exhibit 371 received in evidence)

22 **THE COURT:** Sorry. Next?

23 **MS. MOSKOWITZ:** 364, Your Honor.

24 (Pause in the proceedings.)

25 **THE COURT:** Okay. So I don't have it in today's

1 binder. Was it -- I will check yesterday's.

2 Yes, it was in yesterday's schedule as well.

3 **MS. MOSKOWITZ:** So that thin binder that I handed you
4 should have it. Apologies.

5 **THE WITNESS:** Thank you. 364?

6 **MS. MOSKOWITZ:** 364, sir.

7 **THE WITNESS:** I see the document.

8 **MS. MOSKOWITZ:** Thank you.

9 **BY MS. MOSKOWITZ:**

10 **Q.** You recall during your prior testimony with your counsel
11 talking about Headspace and copycat apps and that stuff?

12 **A.** I do.

13 **Q.** This email is, in fact, an email involving Headspace,
14 right?

15 **A.** Yes.

16 **Q.** And this email, the top of which is from you, on
17 November 30th, 2016?

18 **A.** That's right.

19 **MS. MOSKOWITZ:** Your Honor, I'm going to go ahead,
20 and before I forget, offer PX364 in evidence.

21 **THE COURT:** No objection?

22 **MS. DEARBORN:** No objection.

23 **THE COURT:** Admitted.

24 (Plaintiff's Exhibit 364 received in evidence)

25 **MS. MOSKOWITZ:** Thank you.

1 **BY MS. MOSKOWITZ:**

2 **Q.** So in 2016, you spoke with the CEO of Headspace, right?

3 **A.** Yes.

4 **Q.** And Headspace is an app on iOS?

5 **A.** Yes.

6 **Q.** You spoke with him after he had informed Apple that his
7 app was quote, "suffering from repeated egregious theft of the
8 app's IP in the Apple App Store," right?

9 **A.** Yes.

10 **Q.** And those are copycat apps, right?

11 **A.** Yes.

12 **Q.** And he told your team that consumers were leaving negative
13 comments on the app's social channels because of those copycat
14 apps?

15 **A.** Yes.

16 **Q.** And those copycat apps were approved by AppThORITY, right?

17 **A.** Yes.

18 **Q.** So I just want to understand; is a copycat app only a
19 problem if it's copying an app that's currently on the iOS
20 App Store?

21 **A.** No.

22 **Q.** So if a company that doesn't have an app on iOS finds a
23 copycat of their business on iOS, they can call up Apple and
24 complain?

25 **A.** They can go through disputes process.

1 Q. So *Fortnite*, for example, if you find a copycat app of
2 *Fortnite*, even though *Fortnite* is not on iOS, that would be
3 grounds to remove that app?

4 A. We would try to. We don't want customers to be confused
5 with a developer impersonating another developer, period.

6 Q. And at the app review stage, reviewers are supposed to be
7 on the lookout for copycat apps, right?

8 A. Reviewers and tools.

9 Q. They are comparing -- reviewers and tools.

10 And with respect to the app review process, human
11 reviewers are familiar with the apps that are on iOS; is
12 that how they are doing it?

13 A. Generally there's a lot of apps; so they are certainly not
14 familiar with all of the apps, but the tools help support
15 them.

16 Q. And so would you be upset to learn that there were copycat
17 apps of *Fortnite* on iOS App Store currently?

18 A. Yeah. We re-investigate those.

19 Q. So, if I told you that something called *Battle Survival*
20 was on the App Store, you would send your team and investigate
21 it?

22 A. If you, like any developer, reports that there's an issue
23 with an app, we will send the request to the ARC team to
24 investigate and make sure the app's compliant with our rules.

25 Q. So did I just throw *Battle Survival* under the bus?

1 **A.** I believe you did.

2 **Q.** Apple talks about protecting privacy, and we've spent some
3 time on that today, right?

4 **A.** Yes.

5 **Q.** That's guideline 5.1?

6 **A.** It's one of our privacy templates, yes.

7 **Q.** And you've discussed that there have been rejections for
8 privacy violations, right?

9 **A.** Yes.

10 **Q.** And, likewise, there have been approvals for apps that
11 have gotten through that violate privacy guidelines?

12 **A.** Yeah. We make mistakes.

13 **Q.** And you make mistakes on privacy?

14 **A.** We make -- yeah. Absolutely. We are human. We make
15 mistakes across all of our guidelines.

16 **Q.** Please turn to PX365.

17 **THE COURT:** So 365 -- well, it's in both binders.

18 **MS. MOSKOWITZ:** So one of them made their way over.

19 **BY MS. MOSKOWITZ:**

20 **Q.** Your choice, small or big binder, I think.

21 **A.** Okay. I believe I see 365.

22 **Q.** Great. This is an email chain from March 6, 2018 in which
23 you participated, sir?

24 **A.** Yes.

25 **MS. MOSKOWITZ:** Your Honor, I move PX365 into

1 evidence.

2 **THE COURT:** No objection?

3 **MS. MOYE:** No objection.

4 **THE COURT:** Admitted.

5 (Plaintiff's Exhibit 365 received in evidence)

6 **BY MS. MOSKOWITZ:**

7 **Q.** Let's please go to the email from March 5 from
8 Mr. Schiller in the middle of the first page, please.

9 **A.** I see it.

10 **Q.** He is forwarding on an article from the *Wall Street*
11 *Journal*, right?

12 **A.** Yes.

13 **Q.** The title of that is "Your Location Data is Being Sold
14 Often Without Your Knowledge," right?

15 **A.** Correct.

16 **Q.** And Mr. Schiller says, "There appears to be rampant use of
17 location data based on SDKs that slurp it up after a user
18 approves far beyond what people think they are allowing just
19 for the app experience that they expect."

20 Do you see that?

21 **A.** Yes.

22 **Q.** And he asks you to look into it?

23 **A.** Correct.

24 **Q.** And you say you will?

25 **A.** Yes.

1 Q. Those apps that are being reported in this article were
2 approved by app review, right?

3 A. Yes.

4 Q. You talked about reviewing for objectionable content in
5 your testimony with your counsel.

6 Do you recall that?

7 A. I do.

8 Q. So objectionable content, you gave some examples?

9 A. Yes.

10 Q. We are not going to go back through those. We will talk
11 about some others.

12 But objectionable content can refer to being defamatory,
13 discriminatory, or mean-spirited?

14 A. Yes.

15 Q. And it could also refer to depictions that encourage
16 illegal or reckless use of weapons and dangerous objects?

17 A. Yes.

18 Q. But apps with defamatory, discriminatory, or mean-spirited
19 content make it through AppThority, right?

20 A. Yes.

21 Q. So do apps get through with depictions that encourage
22 illegal or reckless use of weapons and dangerous objects,
23 right?

24 A. I imagine there's been some that have gotten through for
25 that.

1 Q. And you talked about how human review is an important part
2 of the objectionable content review, right?

3 A. Yes.

4 Q. But, again, even with that human review, a number of
5 offensive apps do get through app review and get approved,
6 right?

7 A. Yes.

8 If you could please turn to PX131 in evidence.

9 THE COURT: So it's not in evidence yet.

10 MS. MOSKOWITZ: I believe it is, Your Honor.

11 THE COURT: 131? Wrong page. Yes.

12 MS. MOSKOWITZ: Thank you. It was part of the
13 original stipulation.

14 THE COURT: I have 131 in evidence.

15 Is it in his binder?

16 MS. MOSKOWITZ: It is.

17 THE WITNESS: I have the document.

18 THE COURT: So, Ms. Stone, I'll admit it again for
19 your notes.

20 THE CLERK: Thank you.

21 (Plaintiff's Exhibit 131 received in evidence)

22 BY MS. MOSKOWITZ:

23 Q. In the bottom email, this is an email -- do you have a
24 redacted copy in front of you, Mr. Kosmynka?

25 A. I do not.

1 Q. Do you see names?

2 A. I do.

3 Q. Can you please be careful not to speak them. We are not
4 going to be saying any names.

5 A. Thank you. Yes.

6 Q. Thank you.

7 This is an email from a 14-year-old app developer?

8 A. That's what the e-mail says, yes.

9 Q. And he is reporting about having had to endure the
10 terrible school shooting in Parkland?

11 A. Yes.

12 Q. And he was saying that he had just written an app and it
13 had been rejected because it didn't do the right sign-in
14 mechanism, right?

15 A. Yes.

16 Q. But he reports that -- to you, to Apple -- excuse me, not
17 to you, to Mr. Cook at Apple, that there's a school shooting
18 game on the App Store getting reviews like the best school
19 shooting game by far hashtag kill kids, right?

20 A. That was one of the user reviews.

21 Q. And on the page ending 131.2, Mr. Cook forwards this email
22 to Mr. Schiller who then forwards it to you, among others,
23 right?

24 A. Yes.

25 Q. And you ask your team to investigate how this got in,

1 right?

2 **A.** Yes.

3 **Q.** Meaning how could it be possible that a school shooting
4 app made its way through the automated and human review of app
5 review and got posted to the App Store, right?

6 **A.** I think what I said in the email was I was dumbfounded --

7 **Q.** Indeed --

8 **A.** -- as to how this could be missed.

9 **Q.** Indeed.

10 You say, "I am dumbfounded with how this could be missed."
11 Right?

12 **A.** Right.

13 **Q.** How it could be missed through all the procedures in place
14 within the app review process, including human beings looking
15 at the app saying, I approve this and it gets posted to the
16 Apps Store, right?

17 **A.** Yes.

18 **Q.** After that, even in the past year, Apple's approved other
19 apps that make games out of mass shootings, right?

20 **A.** I am not familiar with any others.

21 **Q.** Let's look at PX2371, please.

22 **THE COURT:** That's in yesterday's binder.

23 **MS. MOSKOWITZ:** Thank you, Your Honor.

24 **THE WITNESS:** I believe I have the document.

25

1 **BY MS. MOSKOWITZ:**

2 **Q.** Thank you. This is an email chain from June 9th, 2020?

3 **A.** Yes.

4 **Q.** You participated in this email chain?

5 **A.** Yes.

6 **MS. MOSKOWITZ:** Your Honor, I move PX2371 into
7 evidence.

8 **THE COURT:** No objection?

9 **MS. MOYE:** No objection.

10 **THE COURT:** Admitted, 2371.

11 (Plaintiff's Exhibit 2371 received in evidence)

12 **MS. MOSKOWITZ:** Thank you.

13 **BY MS. MOSKOWITZ:**

14 **Q.** If you can go to the first email in the chain. Again, if
15 you are not looking at a redacted copy, we just won't mention
16 any names, please, sir.

17 Do you see where I am?

18 **A.** I do.

19 **Q.** This is an email sent to Mr. Cook about an app that was on
20 the App Store as of June 8, 2020, right?

21 **A.** Yes.

22 **Q.** And the email indicates that the entire premise of the app
23 is shooting canons at protestors, right?

24 **A.** Yes.

25 **Q.** The writer of the email, I think we can agree, correctly

1 observes that this was very insensitive and toned up in light
2 of current events, right?

3 **A.** That's right.

4 **Q.** Mr. Schiller forwards that email to you and others asking
5 WTF, right?

6 **A.** Yes.

7 **Q.** I think we can all agree what that means without uttering
8 those words.

9 **A.** Yes.

10 **Q.** And you wrote that, quote, "this would never be an
11 appropriate concept," right?

12 **A.** That's right.

13 **Q.** But that app made its way through app review in 2020,
14 right?

15 **A.** Yes.

16 **Q.** You talked a bit about other types of the objectionable
17 content.

18 Do you recall being shown a document at your deposition
19 that had a number of apps like Waffle and --

20 **A.** I do.

21 **MS. MOSKOWITZ:** Okay. Your Honor, this is not in
22 your binder because it came up during Direct.

23 Can I hand up a few copies?

24 **THE COURT:** You may.

25 **MS. MOYE:** This is PX 315 for identification.

1 **THE WITNESS:** I have the document.

2 **BY MS. MOSKOWITZ:**

3 **Q.** This is the document you recall seeing at your deposition?

4 **A.** Yes.

5 **Q.** And this is a bunch of printouts or screenshots of a
6 number of apps, right?

7 **A.** Yes.

8 **Q.** The first one is Waffle, offensive and NSFW, right?

9 **A.** That's right.

10 **Q.** NSFW is the colloquial term for not safe for work?

11 **A.** That's right.

12 **Q.** Meaning you wouldn't want your employer knowing you were
13 looking at it?

14 **A.** That's what the term means.

15 **Q.** The next one is Shake It-Chat-Meet-Hookup, right?

16 **A.** Yes.

17 **Q.** The next one Ashley Madison, Life is Short.

18 **A.** Yes.

19 **Q.** And there's some description in here about keeping things
20 discrete and I guess hooking up?

21 **A.** Yes.

22 **Q.** The next one is Donja Farm Weed Empire?

23 **A.** Yes.

24 **Q.** That's referring to marijuana?

25 **A.** I think it's referring to cannabis.

1 Q. The next one is Dope Wars, Weed Edition, Light.

2 Do you see that?

3 A. Yes.

4 Q. Light means free?

5 A. Generally.

6 Q. You were deposed, I think it was February of this year?

7 A. That sounds right.

8 Q. So three months ago?

9 A. Yes.

10 Q. After your deposition, did you go back -- back to the
11 office, so to speak, and tell your team about these apps to
12 look into them?

13 A. We've recently looked into these apps, yes.

14 Q. They are all still fine?

15 A. I believe the Waffle, offensive, not safe for work is a
16 candidate for App Store cleanup because currently it does not
17 appear to function.

18 So typically that would be caught in our automated, you
19 haven't updated in a significant period of time, your app
20 doesn't function, and so it should fall off the store
21 organically. But we do need to run this through the formal
22 arc process.

23 Q. So you wouldn't be surprised then if it's still on the
24 store today?

25 A. I am surprised that it's on the store today given that it

1 appears outdated and not functioning.

2 To determine whether or not the content in the app is
3 offensive and not safe for work, I would need it to work in
4 order for me to actually review the content that's in it. But
5 at this point, that title -- I'm sure that it is connected to
6 the content that they had at one point, but at this point it
7 just has a spinner.

8 **Q.** Okay. But so you would not expect it to be on the App
9 Store today?

10 **A.** No, I think it needs to come down because it's not
11 functional.

12 **Q.** Okay. So do I need to show you that it is, or are you
13 just going to say you're taking it down after we leave here
14 today?

15 **A.** I think we need to investigate it at which point if --
16 maybe it was an isolated issue where I reviewed the app and it
17 doesn't work. The team will have to exercise it and see if
18 that was a Trystan technology problem or an actual issue with
19 the app, at which point if they can get through, then they
20 should be able to review that content.

21 **Q.** So is it just that it's stale and needs to come down as
22 cleanup or are you concerned that this app has been up for
23 months with at least purporting to contain offensive content,
24 or both?

25 **A.** I am concerned about the app given the title, but the

1 description talks about Cards Against Humanity, which is a
2 game that people play that certainly has what I would call
3 offensive-not-safe-for-work-type commentary, but that might
4 not be actually in the app. It may facilitate game play of
5 some sort via Card Game. So I need to know more about the
6 app, and in order to do that it needs to work.

7 Q. You've played Cards Against Humanity?

8 A. I believe so, yeah.

9 Q. Okay. Do they have an app on the iOS App Store?

10 A. I'm sure they do.

11 Q. And is that permissible under the offensive content
12 guidelines?

13 A. I believe it is.

14 Q. Leave all the content on but Cards Against Humanity is
15 completely appropriate?

16 A. I have not memorized the cards in Cards Against Humanity.

17 Q. Have you heard of the MLG Clicker: aluminadi irate
18 (phonetic) app?

19 A. No.

20 Q. So you're not familiar with that app at all?

21 A. I don't recall.

22 Q. So Mr. Schiller did not tell you that he was asked about
23 that app after his deposition and asked you to look into it?

24 A. I get frequent -- reported apps from Mr. Schiller. It's
25 possible that he reported the app to me, but I don't recall

1 specifically that case.

2 Q. And so you couldn't tell me one way or the other whether
3 it should remain as it does on the App Store today?

4 A. The name is certainly an indication that there's concern
5 there.

6 Q. So you are going to look into that one, too?

7 A. I would like to, yeah.

8 MS. MOSKOWITZ: Your Honor, if I can have a brief
9 moment? I'm a little disorganized.

10 THE COURT: Do you want 315 in or not?

11 MS. MOSKOWITZ: I would like that in, please, Your
12 Honor.

13 THE COURT: Any objection?

14 MS. MOYE: There is no objection, Your Honor.

15 THE COURT: 315 is admitted.

16 (Plaintiff's Exhibit 315 received in evidence)

17 MS. MOSKOWITZ: Your Honor, thank you. No further
18 questions.

19 Thank you, Mr. Kosmyнка.

20 THE WITNESS: Thank you.

21 THE COURT: Re-examination limited to the scope.

22 MS. MOYE: Thank you.

23 **RECROSS-EXAMINATION**

24 BY MS. MOYE:

25 Q. Mr. Kosmyнка, just a couple of issues.

1 First, I would like you to take a look at PX131. This is
2 the document that Epic's counsel referred to as relating to a
3 school shooting app.

4 **A.** Yes.

5 **Q.** Do you have that document?

6 **A.** I do.

7 **Q.** Could you please explain for the Court what was the nature
8 of the app that was being discussed here?

9 **A.** This app was titled High School Rescue or -- *High School*
10 *Rescue Hero Squad*. And so the players that you would play in
11 the app were super heroes whose purpose in this scenario was
12 to protect the school from terrorist activity or attacks.

13 This particular app had different variations of the app.
14 In some case you're protecting the City Center in one app,
15 you're protecting a fire hall, police stations. So this was
16 kind of re-skins of similar game play.

17 This is certainly a mistake, but that was the nature of
18 what that game was.

19 **Q.** Was this an app in which players were shooting students?

20 **A.** No.

21 **Q.** Did you nevertheless believe it was inappropriate?

22 **A.** A hundred percent.

23 **Q.** What steps did you take when you learned it was on the
24 store?

25 **A.** So we immediately took it down. Earlier in the thread I

1 mentioned that -- like don't miss this other one. I was able
2 to use our binary similarity tools to find the similar app
3 that we took down. So we found that one before our customer
4 complaints.

5 And we scanned out further than that and found that this
6 particular developer had 268 apps that were -- around 268 apps
7 that were re-skins of similar concepts. That would have been
8 removed, the developer would have been terminated from the
9 program.

10 And then as I said in bullet three, number three, I think
11 we'll see copycats of this, and we should include school
12 shooting and terrorist-related terms in our objectionable
13 content validations.

14 So the rule system in which I mentioned earlier, would
15 have been in full deployment at this point and we would have
16 been able to proactively alert specialists to such types of
17 sensitive things. In this case, I think, as I said, I'm
18 dumbfounded with how it could have been missed, even without
19 the validation, but certainly we use tools in this case.

20 The other thing earlier in the thread, the specialists
21 that would have reviewed it, would have been pulled off the
22 process, we would have used our business excellence quality
23 and audit organization to have done a deep dive into the
24 mistakes that the specialist has made, the mistakes the
25 process has made, and work with both of those to ensure that

1 our potential at it happening again recurring is reduced and
2 limited and hopefully eliminated.

3 **Q.** Thank you, Mr. Kosmyнка.

4 Epic's counsel showed you a handful of examples of
5 mistakes that had been made in the app review process. Do
6 those mistakes cause you to believe that app review is
7 unnecessary?

8 **A.** No. It makes me believe that we have to continuously be
9 better.

10 The mistakes that I was shown -- these mistakes originated
11 from customer and developer complaints. That tells me that
12 our customers expect that our store is a safe and trusted
13 place to get apps and that they found an issue.

14 I'm glad they're passionate. I'm glad that they are
15 emailing executives reporting the concerns, and that we
16 investigate them quickly and we improve from it. But the fact
17 that these are coming from customers that care about their
18 store experience tells me that the human process and the app
19 review process as a whole is critical to a superior customer
20 experience and a safe one.

21 **Q.** Mr. Kosmyнка, how do you think the number of problematic
22 apps, apps of the type that Epic's counsel pointed you to, how
23 would the number of such apps increase or decrease if Apple
24 allowed stores within a store?

25 **MS. MOSKOWITZ:** Objection, calls for speculation.

1 **THE COURT:** Well, it lacks foundation. I mean it's
2 pretty conclusory.

3 Sustained on that basis.

4 **BY MS. MOYE:**

5 **Q.** Mr. Kosmyнка, do you believe that -- tell us your belief
6 with respect to what percentage of problematic apps you can --

7 **MS. MOSKOWITZ:** Same objection.

8 **THE COURT:** You can't have an objection until the
9 question is finished. Let's not jump in and answer. Let me
10 hear a question.

11 **BY MS. MOYE:**

12 **Q.** Mr. Kosmyнка, based on your experience, five years as head
13 of app review, in your opinion, what is the ratio of the
14 problems you catch to the problems you miss?

15 **MS. MOSKOWITZ:** Objection.

16 **THE COURT:** Overruled on that. Different question.
17 Overruled.

18 **THE WITNESS:** We proactively catch the best majority
19 of issues. We certainly do miss some. I think it is a small
20 fraction. And we are constantly working to reduce the amount
21 of things that we miss. And I think that a lot of these
22 scenarios, these documents that were shared today, indicate
23 that there's loopholes. There's ways in which systems can be
24 gamed and people can be gamed.

25 And we work diligently to try to close those loopholes.

1 But the key there is that there are systems and people to
2 game. And without the systems and the people to game, it's a
3 free-for-all.

4 I think it would be incredibly dangerous for customers,
5 for my four kids, and truly believe that this process is
6 critical to a safe and trusted place to get apps.

7 **MS. MOYE:** Thank you, Mr. Kosmyuka. No further
8 questions.

9 **THE COURT:** Anything on those questions?

10 **MS. MOSKOWITZ:** Just briefly, Your Honor.

11 **REDIRECT EXAMINATION**

12 **BY MS. MOSKOWITZ:**

13 **Q.** You just referred to what would happen, in your view, if
14 the iOS app review process was not able to exist.

15 Is that a fair summary of what you were just talking
16 about?

17 **A.** The app review process and the store in general.

18 **Q.** Right. Mac, you are familiar with the MacOS?

19 **A.** Yes.

20 **Q.** And Mac has a store, right?

21 **A.** Yes.

22 **Q.** Mac also allows apps to come in outside of the store onto
23 the machine, right?

24 **A.** That's right.

25 **MS. MOYE:** Objection to the scope.

1 **THE COURT:** Overruled.

2 **BY MS. MOSKOWITZ:**

3 **Q.** Mac users are able to exist in the macOS in a safe
4 environment and kids use them notwithstanding the fact that
5 they can obtain apps from outside of the App Store, right?

6 **A.** Can you repeat the question?

7 **Q.** Sure.

8 Kids, people, users who have Macs are able to obtain apps
9 from outside of the Mac App Store, right?

10 **MS. MOYE:** Objection, Your Honor, beyond the scope.

11 **THE COURT:** Overruled.

12 **THE WITNESS:** On Mac there is a way to get native
13 apps outside of the Mac App Store.

14 **BY MS. MOSKOWITZ:**

15 **Q.** And on Mac, you would still believe, I think, would you
16 agree with me, that kids that use Macs and all sorts of
17 consumers that use apps on Mac that they got from outside of
18 Mac are still able to be safe and secure in their computing?

19 **THE COURT:** Okay. Can you answer that question?

20 **THE WITNESS:** I will try, Your Honor.

21 I think that their safety on Mac is superior when
22 downloading apps from the Mac App Store. I think that kids
23 and users of the Mac, given the way that we see developers on
24 iOS and on Mac, attempt to manipulate customers and trick
25 customers. And the threats that we see on iOS, even within

1 the App Store, I can't say that any customer outside of the
2 Mac App Store has a safe and trusted experience. I think that
3 that is something where they've opened themselves up to risk.

4 **BY MS. MOSKOWITZ:**

5 **Q.** And that's a risk on the sort of objectionable content,
6 not on security or malware threats, right?

7 **A.** No, I think it's risk on all of the above.

8 **Q.** Okay. So all of Mac users who download apps outside of
9 the Mac store are exposed to malware?

10 **A.** No. I'm saying they're taking additional risks if they
11 do. I don't know if they are exposed to it or not.

12 **Q.** Okay. So you don't have any understanding as to whether
13 the operating system of Mac is protecting those users from
14 malware?

15 **A.** Our operating systems across the board work really hard to
16 protect customers. That's not enough. In the event there is
17 a bad actor that exploits hardware and software having an
18 element of curation on top of that, and having the customers
19 go through that curated element, gives us additional trust and
20 safety that I think is really critical on our devices.

21 **Q.** And other app stores out there do some app review, right?

22 **A.** I believe so.

23 **Q.** And you understand that Epic is not seeking to eliminate
24 app review from app store experiences, right?

25 **A.** I am not sure what Epic is seeking.

1 **THE COURT:** That is beyond the scope.

2 **MS. MOSKOWITZ:** No further questions.

3 Thank you, Your Honor.

4 **THE COURT:** The other was beyond the scope, too, but
5 I wanted to hear the answer.

6 Anything on that?

7 **MS. MOYE:** No, Your Honor. No further questions.

8 **THE COURT:** So I have just a few questions.

9 **EXAMINATION**

10 **THE COURT:** With respect to Flight Test or Test
11 Flight --

12 **THE WITNESS:** Test Flight.

13 **THE COURT:** Test flight, how is it that you -- that
14 your company was acquired by Apple? Did you go to Apple or
15 did Apple go to you?

16 **THE WITNESS:** I think we had a long history of going
17 to the developer conference and talking to various folks at
18 Apple. And I think the initial conversation was probably an
19 outreach by us, but I don't recall the specifics. That was a
20 long process.

21 **THE COURT:** It's not uncommon for big companies to
22 acquire smaller companies that they think are doing innovative
23 things. Has Apple been approached by -- I mean, you've
24 identified a couple of security-like companies that were doing
25 things. Is there anybody out there who is doing it better or

1 differently than Apple?

2 **THE WITNESS:** I couldn't comment on better, but
3 certainly there's companies that do things differently all the
4 time. And I can't, I guess, presume how they are doing it.
5 But I can say from my own experience, Your Honor, with the
6 Source DNA and AppThORITY, when we were looking to acquire
7 those potential companies, there was an element of what they
8 were doing that we were not doing yet.

9 So I think that innovation exists everywhere. And I would
10 be foolish to say that there's not companies outside of Apple
11 that are doing things differently. They certainly do.

12 **THE COURT:** One of the problems with limiting
13 competition is you don't get innovation. And -- or at least
14 it's a possible, right, it's a possible outcome.

15 So one of the concerns, at least my sense with this
16 lawsuit is, that if you are not allowing parties to compete on
17 these topics, then it won't -- things won't improve.

18 So, in terms of -- let's say the Android, do you look at
19 the results that Android is having on issues with respect to
20 security and privacy, fraud, scams, all of that, in terms of
21 comparison with what Apple is doing?

22 **MS. MOSKOWITZ:** Yeah. I do pay attention to multiple
23 platforms to understand how they approach things, what their
24 approach is.

25 What I don't have visibility into is what their success

1 rate is in preventing things from making it to the store.

2 **THE COURT:** Which platforms do you look to?

3 **THE WITNESS:** I would say primarily Android we would
4 like at. But we also, when it comes to say a takedown of some
5 sort, like a compliance request that we have, I would like at
6 other app stores, there's other app stores in China as well to
7 understand if the apps are also available there.

8 And then also just from the process of reading reports,
9 there was an email here about malware that was discovered that
10 was click fraud. A lot of times we'll see those types of
11 articles. It will list Android apps. We'll also look to see
12 if those apps are on iOS just to be certain that they're
13 not. More than often they are not.

14 **THE COURT:** Do you hire third parties to
15 independently review what's being marketed on the App Store
16 and then kind of give them a kind of bounty fee or something
17 like that to thank them for finding things that your process
18 hasn't?

19 **THE WITNESS:** No, we don't do that.

20 **THE COURT:** So categories of apps. Yesterday you
21 talked about Roblox was not a game, but *Minecraft* was. I'm
22 having a hard time with that. Because I looked at Roblox and
23 it looked like an electronic version of Duplos. You have kids
24 so you know what I mean.

25 **THE WITNESS:** I do.

1 **THE COURT:** Right?

2 It doesn't make sense to me. And it doesn't -- you know,
3 logically if your kid said -- you know, I showed you this app
4 and I said my friends are playing this and I want to play, it
5 would seem to me that they want to play a game.

6 I mean, I'm trying to understand what the distinctions
7 you're making because I didn't think that there was some
8 industry word for the word "game."

9 **THE WITNESS:** Your Honor, I don't know if there is an
10 industry word for game. I am not an expert in gaming.

11 What I can say from a review standpoint, Roblox has
12 classified itself as an app. Other games classify themselves
13 as games. I think the topic we were thinking about was, are
14 there games within Roblox.

15 And so I think regardless of whether we say Roblox is a
16 game or an app, the same rules apply. And similarly, with
17 Roblox and *Minecraft*, the experiences that my kids would play
18 in that, I would refer to those as experiences or content;
19 that the thing that is coming to the device post-review at
20 that point is a configuration file that has some kind of
21 technical boundaries on it.

22 If I can take an example that isn't a game, think of
23 something like productivity software that has templates.
24 Those templates might be dynamic. They might react in certain
25 ways. They may even have third parties that build templates

1 for them. They are going to be a template always. A template
2 does not turn into something that changes the features and
3 functionality.

4 So that -- that -- I think that's the distinction I was
5 trying to make between how I view what's inside Roblox versus
6 Roblox itself.

7 **THE COURT:** Is there a list of -- on a separate
8 topic -- is there a list of all the separate categories of
9 apps? I heard you say that someone chooses to put their app
10 into a particular category. And I couldn't find a list of the
11 entirety of the applicable categories.

12 **THE WITNESS:** Your Honor, there is a list available.
13 This should be publicly documented on, I believe,
14 developer.Apple.com. It's in some of our support systems.

15 But then as a customer on the App Store, I believe you can
16 go to the games in the apps sections. And if you look, I
17 think you have to scroll below, you can see the categories and
18 navigate them as a customer. Those categories match up to
19 what the developer would select in App Store Connect when they
20 configure their store metadata.

21 **THE COURT:** How many are there?

22 **THE WITNESS:** I don't know the exact number. I'm
23 going to say more than 20. And there's subcategories as well.
24 You've got lifestyle, games, newspapers, magazines --

25 **THE COURT:** Can we get those in the record, please?

1 MS. MOYE: Yes, Your Honor.

2 THE COURT: Okay. Any questions on my questions?

3 MS. MOYE: No, Your Honor.

4 MS. MOSKOWITZ: I have one or two.

5 THE COURT: Okay.

6 You should just say yes. Never commit yourself.

7 MS. MOSKOWITZ: You're right. Very good advice.

8 FURTHER REDIRECT EXAMINATION

9 BY MS. MOSKOWITZ:

10 Q. Just on the Roblox topic, you talked about experiences and
11 content in responses to the Judge's questions?

12 A. Yes.

13 Q. Are you familiar with Roblox having *Battle Royale*-type
14 modes within Roblox?

15 A. I am not.

16 Q. So you're not familiar with the *Island Royale* mode?

17 A. No.

18 Q. Or the *Prison Royale* mode?

19 A. No.

20 Q. So --

21 THE COURT: See, that was more than two.

22 MS. MOSKOWITZ: It was.

23 THE COURT: You can --

24 MS. MOSKOWITZ: I actually think that is -- I think
25 that is sufficient. Thank you so much, Your Honor.

1 Thank you, Mr. Kosmyнка.

2 **THE WITNESS:** Thank you.

3 **THE COURT:** Okay. I think that is it.

4 **THE WITNESS:** Thank you, Your Honor.

5 **THE COURT:** You're excused. Next witness.

6 **MS. MOSKOWITZ:** I understand our hot seat needs to
7 switch over --

8 **MR. CLARKE:** Your Honor, Epic Games calls Mr. Steve
9 Allison.

10 **THE COURT:** Okay.

11 **THE CLERK:** Remain standing and I will swear you in.
12 Thank you.

13 (STEVE ALLISON, called as a witness for the Plaintiff,
14 having been duly sworn, testified as follows:)

15 **THE WITNESS:** I do.

16 **THE CLERK:** Please be seated. Then would you please
17 state your full name and spell your last name.

18 **THE WITNESS:** My name is Stephen Matthew Allison. My
19 last name is spelled A-L-L-I-S-O-N.

20 **THE COURT:** Good morning, sir.

21 **THE CLERK:** And the mic, don't push it away. Thank
22 you.

23 **THE COURT:** Mr. Clarke, you may proceed.

24 **MR. CLARKE:** Thank you, Your Honor.

25 Your Honor, I have one exhibit I intend to use with the

1 witness. Would you like me to hand that up?

2 **THE COURT:** You may.

3 Was he deposed?

4 **MR. CLARKE:** Yes, Your Honor.

5 **THE COURT:** Do I have his deposition transcript?

6 **MR. CLARKE:** Your Honor, I am happy to hand that up
7 as well.

8 **THE COURT:** You may proceed.

9 **MR. CLARKE:** Thank you, Your Honor.

10 **DIRECT EXAMINATION**

11 **BY MR. CLARKE:**

12 **Q.** Good morning, Mr. Allison.

13 **A.** Good morning.

14 **Q.** Could you please introduce yourself for the record?

15 **A.** Yes. I am Steve Allison. I am the vice president and
16 general manager of the Epic Games Store.

17 **Q.** And Mr. Allison, where do you work?

18 **A.** I work at Epic Games in Cary, North Carolina.

19 **Q.** Mr. Allison, could you please summarize your professional
20 background before joining Epic Games?

21 **A.** Sure.

22 I am an over 20-year veteran of the video game industry.
23 I started early in my career in the mid '90s at a company
24 called Atari where I worked on a variety of roles, but most
25 predominately as the vice president of marketing and business

1 development.

2 After Atari I went to a company called Midway Games as a
3 chief marketing officer and senior vice president of
4 marketing. I worked there about five years.

5 We -- Midway Games created franchises like the *Mortal*
6 *Combat* series. After Midway, I joined a company called
7 Telltale Games where I worked --

8 **THE COURT:** Telltale?

9 **THE WITNESS:** Telltale, T-E-L-L-T-A-L-E as the senior
10 vice president of publishing. We -- I was there to build
11 self-publishing organization and work on the product
12 development with the founders where we created a new genre
13 called interactive narrative and had several game-of-the-year
14 products like *The Walking Dead*, *Minecraft Story Mode* and *The*
15 *Wolf Among Us*.

16 After Telltale, I joined Epic Games in May of 2018.

17 **Q.** Mr. Allison, when you first started working in the gaming
18 industry, what was the primary means of distributing game
19 titles?

20 **A.** In the early '90s, when I started in the industry it was
21 packaged goods, a retail/wholesale model.

22 So you want me to -- shall I describe?

23 **Q.** When you say retail/wholesaler, you're referring to
24 physical retail?

25 **A.** Yes. So physical package goods is how PC games were

1 distributed in the mid '90s.

2 **Q.** In that physical distribution model, how did stores make a
3 profit off of the sale of games?

4 **A.** The wholesale-to-resale model was basically how publishers
5 would fund games, and then when the games were finished, they
6 would build physical products, CDs and boxes. They would sell
7 them to a retailer, or stores like Wal-mart, or CompUSA or
8 game in Europe.

9 The model was based -- say we have a \$60 suggested retail
10 price, the retailer would seek to have a 30 percent markup.
11 So the wholesale price would be 30 percent less. The
12 publisher would sell it to the retailer for a \$60 game at \$42
13 more or less.

14 **Q.** Do you have an understanding for how much of that markup
15 the physical store would ultimately retain as profit?

16 **A.** They would, in the end, they have exposure to things like
17 theft and loss and markdowns; if the product doesn't move,
18 typically around 20 percent.

19 **Q.** Mr. Allison, you referenced publishers. What sorts of --
20 what role would a publisher play in this distribution chain?

21 **A.** In this period of our -- of time for the business, they
22 were really the gatekeeper to distribution and the source of
23 capital for development. And then they would also be the
24 marketing and go-to-market people. So they really played a
25 critical role, one of the most important.

1 Q. Mr. Allison, do you have an understanding of the wholesale
2 price you mentioned a moment ago, how much of that would
3 ultimately go to a game developer?

4 A. Could I start by talking about what goes to the publisher
5 and then that will lead to what goes to a developer?

6 Q. Please.

7 A. So publisher would get -- let's go back. They would get
8 \$42 on that \$60 sale. They would have costs associated with
9 building the boxes, making the discs, shipping it to
10 warehousing, logistics. They had a whole sales team
11 organization. They would incur costs --

12 THE COURT: Mr. Allison, I'm going to ask you to slow
13 down a little.

14 THE WITNESS: Yes. Yes, ma'am.

15 They would typically incur costs around \$10 a unit on a
16 full-priced game. So on a 42 -- in this scenario, they would
17 have \$32 of net revenue.

18 BY MR. CLARKE:

19 Q. Do you have an understanding for how much of that -- how
20 much of that value would ultimately go to the developer?

21 A. Yes. This is slightly complex, so I'll try to walk
22 through it.

23 Developers would sign publishing agreements at this time.
24 They were based on getting project funding for a game. The
25 publisher would fund the game entirely, usually retain the IP,

1 and then they would have a recoupment that would be typically
2 at the royalty rate that the developer was getting from the
3 publisher from net revenues; so from that \$30.

4 Typically those royalties would be anywhere from 15 to 30
5 percent, but the average take-home would be around 20 percent.

6 **Q.** Thank you.

7 And during what time period would you say this particular
8 physical distribution model was prevalent?

9 **A.** Really from the early '80s when retail PC distribution
10 started becoming a thing on through the early 2000's.

11 **Q.** Now, you said you were hired by Epic in May of 2018; is
12 that correct?

13 **A.** That's correct.

14 **Q.** When you were hired by Epic, were you given any particular
15 assignment.

16 **A.** To work on the strategy and ultimately the launch of the
17 Epic Games Store.

18 **Q.** And what is the Epic Games Store?

19 **A.** The Epic Games Store is a digital distribution platform
20 for games and apps for PC and Mac.

21 **Q.** When was the Epic Games Store launched?

22 **A.** In December of 2018.

23 **Q.** Is the Epic Games Store available as a native application
24 on any mobile device today?

25 **A.** Not currently.

1 Q. Would an Epic Games Store user on a PC be able to access
2 his or her Epic Games Store account on a Mac device?

3 A. Yes.

4 Q. And if they were to do that, what sorts of functionality
5 would they have access to?

6 A. So the Epic Games Store application, we call it The
7 Launcher, is available both on PC and Mac. It's the same
8 functionality either way. The distinction would be if you're
9 a Mac user and you log in, you can see the whole store for PC
10 and Mac but you'd only be able to launch Mac applications.

11 Conversely on PC, you would see your whole library but
12 you'd only be able to launch PC applications.

13 Q. And what sorts of apps are on the Epic Games Store today?

14 A. Predominantly games and some nongame apps.

15 Q. When did Epic first start having conversations around
16 offering nongame apps on the store?

17 A. We announced the store in December of 2018. Pretty
18 quickly, after the announcement, we had a bunch of inbound for
19 both gaming and nongaming app companies wanting to know more
20 about the store and how they could bring their products to
21 market with us.

22 Q. Could you identify any nongaming app companies that
23 reached out at that time?

24 A. We spoke with Twitch. We spoke with Discord. We spoke
25 with a lot of smaller game development or game adjacent

1 companies as well.

2 Q. At that time, did Epic accept any of those stores onto the
3 store?

4 A. We couldn't. So no.

5 Q. Why not?

6 A. Sorry.

7 We had very specific -- we were constrained by what we
8 could bring to market. We had a quick-to-market launch, and
9 we had some exclusive games that we had to get to market and
10 focus on.

11 Q. Are there any technical differences between distributing a
12 gaming app and a nongaming app on the Epic Games Store?

13 A. Not particularly.

14 Q. When the Epic Game Store was launched, were there any
15 other digital online stores out there?

16 A. Yes.

17 Q. Could you name a few for the Court?

18 A. Yeah. Sure.

19 Valve has a store called Steam. So a company Valve in
20 Seattle runs a gaming store called Steam which carries PC
21 games, Mac games, and nongaming applications and actually
22 sells some video as well.

23 Microsoft has a store called the Windows 10 Store, which
24 sells games and apps.

25 There are publishers who self-publish and have created

1 their own stores. Major publishers like Electronic Arts, they
2 have a store called Origin, which is focused on their
3 first-party content.

4 We have Activision Blizzard has a store called
5 Blizzard.net which only sells their first party -- and
6 first-party content means their own games and applications --
7 their first-party content.

8 Ubisoft has a store called You Play. And then we have
9 some game-only stores like Good Old Games run by a company
10 called CD Project.

11 And then we have what we call resellers. There's a number
12 of these companies like Green Man Gaming and The Humble Store.
13 And they typically will sell keys to games on the Epic Games
14 Store or Steam.

15 **Q.** So how would users of one of these stores get an app from
16 the store onto their device?

17 **A.** You would go to the store, either on -- you'll go to the
18 store on the Launcher. You would purchase a game or hit the
19 "Get" button if it's a free-to-play game. You would go
20 through the purchase flow. Upon successfully completing the
21 purchase flow, you would be able to download the game to your
22 PC or Mac.

23 **Q.** Thank you.

24 Now, if the time period that the Epic Games Store
25 launched, was any of the other stores that you've just

1 identified particularly dominant in the marketplace?

2 **A.** Yes. Ralph's Store Steam is a dominant player in the
3 space and was in 2018 with 70 to 85 percent market share
4 depending on how you define the space.

5 **Q.** Was Steam charging any sort of a commission at the time
6 that Epic decided to launch the Epic Games Store?

7 **A.** Yes.

8 **Q.** Do you know what that was?

9 **A.** Yes. 30 percent.

10 **Q.** Do you have any understanding for where that 30-percent
11 number came from?

12 **A.** I do.

13 **Q.** What's your understanding?

14 **THE COURT:** What's the basis for your understanding?

15 **THE WITNESS:** I worked closely with Steam in my
16 career and also I'm close personal friends with several of the
17 founders and people who are at the company -- were at the
18 company then and are today.

19 **BY MR. CLARKE:**

20 **Q.** Could you please provide your understanding?

21 **A.** Yes.

22 There is a bit of a story here. Do I have time to go
23 through it concisely?

24 So, there was a period of time -- so we talked about
25 physical retail and the sort of emergence of it through the

1 '90s and 2000's. In the early 2000's, physical retail on PC
2 games startled to climb tremendously. The results weren't
3 happening and console gaming was on the rise. So console
4 games are other platforms, and they were also selling physical
5 goods.

6 What was happening is, the shortest way to say it is, the
7 PC gaming market was abandoned by retail more or less over a
8 period of five or six years starting in early 2000 and on
9 through 2006 or 2007.

10 What happened was PC developers in particular were left in
11 a lurch, basically, with limited distribution options.
12 Digital distribution was pretty early in its infancy. Valve
13 took a step in 2003 to digitally publish -- self-publish their
14 game Counter-Strike to great success.

15 So they had the rights to do it. They already had a
16 retail skew in 2000. They decided to self-publish a digital
17 version of it in 2003. They sold close to three million units
18 in a period of 18 to 20 months.

19 After -- all of this is happening around the time the PC
20 market was declining for physical goods. In 2005, Steam
21 invited select developers to join what they would call their
22 Launcher, which is their application that was running
23 Counter-Strike and they basically created what was the first
24 significant PC store that was an application on PC.

25 And they -- the overture to get developers to join them

1 was like, hey, we're going to -- we're upset with what's
2 happening in the physical marketplace with PC games, and we
3 want to provide a digital store option. Please join us. We
4 will take what the -- we will only take what the retailers
5 seeks to take which would be a 30-percent cut of your sales
6 and you'll get 70 percent.

7 **THE COURT:** When you say it was abandoned by retail,
8 I'm trying to think back to that period of time. I would go
9 to Game Stop and things like that for games.

10 Those were on the decline or when you're talking about
11 retailer, you're talking about the Targets and Wal-marts?

12 **THE WITNESS:** All of it actually. It started
13 mostly -- it started with Walmart who had probably 30 percent
14 market share or just completely leaving the category. And it
15 slowly eroded over time at places like Game Stop. They just
16 started less and less shelf space in favor of making shelf
17 space, in the case of Game Stop, for console games.

18 **THE COURT:** Okay. Okay. Was that also because PCs
19 couldn't handle the -- the amount of power that was required
20 for these games?

21 **THE WITNESS:** No. It was -- there's a variety of
22 factors that were -- the shelf space required -- PC games
23 didn't have a standard. It's very complicated stuff so I'll
24 try and be concise.

25 PC games didn't have a standard box size. Some game

1 publishers would make boxes this big. Some game publishers
2 would make boxes this big. And when you put them on the
3 shelf, it was an ugly display. It got really messy. They
4 couldn't plan their stores around it. Console games were
5 coming in and just using a DVD case, very neat and clean.

6 And there were more and more PC games coming actually than
7 retail could even take in. So the -- there was a huge decline
8 in the amount of sales. There was problems merchandising at
9 physical retail, and Walmart was the first to exit and then it
10 slowly eroded from there.

11 **THE COURT:** Because the downloads of PC games was not
12 really very good either.

13 **THE WITNESS:** PC gaming digital at this time was just
14 very early. Yes.

15 **THE COURT:** All right. Go ahead.

16 **BY MR. CLARKE:**

17 **Q.** Mr. Allison, so I want to focus on the time period that
18 Epic launched the Epic Games Store here for a minute.

19 During the time period that Epic decided to launch the
20 Epic Game Store, what was the sentiment in the general
21 developer community surrounding Steam?

22 **A.** In 2018?

23 **Q.** Correct.

24 **A.** So -- should I set up some context? I think that's
25 valuable.

1 When they made -- when they established the 70/30 split in
2 2005, it was very well received by the development community.
3 It was a big shift from the economics of physical retail. And
4 over a period of years, from 2005 to around 2010, there was a
5 real boom in both Steam's business and just PC gaming and
6 digital gaming in general. We really matured in our ability
7 to distribute games.

8 What also happened was Steam grew, was several other
9 companies -- the PC and Mac is an open platform. So on PC, in
10 particular, we had several developers experimenting what I
11 would call self-publishing. Self-publishing means you don't
12 need to use Steam Store. You can wire into e-commerce
13 solutions. You can even do it on a web page. You can build
14 your own application.

15 **THE COURT:** Slow down.

16 **THE WITNESS:** Sorry.

17 You can build your own application to host and sell your
18 game. Some examples would be in 2004, a game out of South
19 Korea called *MapleStory* followed right after *Counter-Strike*
20 and sold 240 -- still runs today and has over 200 million
21 users but sold tens of millions of units very quickly -- or
22 had tens of millions of players very quickly.

23 There's a game called *Minecraft* that came in 2011 that was
24 self-published by a small team and quickly sold over
25 20 million units. So the economics of self-publishing were

1 quite a bit different than the economics you would get on
2 Steam.

3 So if you self-publish, you generally have, between your
4 finances charges -- your e-commerce charges and your, what we
5 call content delivery network or CDNs of downloading code,
6 typically could get -- would be about 5 percent.

7 **THE COURT:** So just imagine for a moment that
8 someone -- that you are trying to type everything that you
9 say.

10 **THE WITNESS:** I'm sorry.

11 **THE COURT:** That's what she's trying to happen here.

12 **THE WITNESS:** I'm sorry.

13 **THE COURT:** She's a very nice person. Try to slow
14 down.

15 **THE WITNESS:** Yes, ma'am. It's in my DNA, but I will
16 slow down.

17 **THE COURT:** Next -- why don't you ask the next
18 question.

19 **THE WITNESS:** Redirect me, please.

20 **BY MR. CLARKE:**

21 **Q.** Sure. The question was, if you could explain the
22 sentiment in the developer community.

23 **A.** So where I left off --

24 **MS. DUNN:** Objection, Your Honor. Foundation.

25 **THE COURT:** Overruled.

1 **THE WITNESS:** Where I left off on self-publishing
2 economics, I just wanted to get in so the 5 percent cost --

3 **THE COURT:** You just can't do it.

4 **THE WITNESS:** I can do it.

5 Where the 5 percent -- the 5 percent of those costs left
6 the developer, who self-published with 95 percent of the
7 revenue coming in from the sales of their games or in-game
8 items.

9 It's a very different economic structure than what Steam
10 was providing at the time.

11 Lots of developers were aware of the difference -- the
12 different economic models that were sort of emerging. People
13 were fascinated by what was happening in Korea with games like
14 *MapleStory* as well with *Minecraft*.

15 Big publishers who had the resources like Electronic Arts
16 in 2011, had between 2005 -- I'm going to get to the
17 sentiment -- and 2011, went on to Steam and had sort of a
18 resurgence in the PC business but they also believed that the
19 30 percent was unreasonable as they started to see what kind
20 of economics they could get if they self-published.

21 So they left Steam entirely in 2011 and formed their store
22 called Origin. So the sentiment --

23 **THE COURT:** What is it called again?

24 **THE WITNESS:** Just sort of the narrative of how the
25 different --

1 **THE COURT:** Mr. Allison, I didn't write the name
2 down, Electronics Arts store.

3 **THE WITNESS:** Origin.

4 **THE COURT:** Origin. I see.

5 **THE WITNESS:** Several events like this happened
6 between 2011 and 2018. So the sentiment in 2018 was fairly
7 broadly that the 30 percent was -- could be considered
8 unreasonable.

9 **BY MR. CLARKE:**

10 **Q.** Mr. Allison, can you explain why Epic decided to launch a
11 store during this time period?

12 **A.** We wanted to provide an alternative that was reasonable.

13 **Q.** Mr. Allison, do you have an understanding for what Steam's
14 current commission structure is today?

15 **A.** I do.

16 **Q.** What is its current structure?

17 **A.** So the week before we launched the Epic Games Store, they
18 announced a change to their revenue model -- or their revenue
19 share model.

20 So it's still 70/30 for the first -- for any game that
21 launches for the first \$10 million in sales. Then they go to
22 a second tier that after \$10 million, every dollar over
23 10 million but less than 50 million is a 75/25 split. If a
24 game gets past the 50 million threshold, which would be the
25 third and final tier, that goes to -- every dollar after \$50

1 million goes to a 80/20 split.

2 **THE COURT:** Is that gross or net?

3 **THE WITNESS:** That is gross.

4 **THE COURT:** The million, the tiers.

5 **THE WITNESS:** Gross sales, yes.

6 **BY MR. CLARKE:**

7 **Q.** So, Mr. Allison, when the Epic Games Store launched, did
8 Epic have a strategy to attract developers to the store?

9 **A.** We did.

10 **Q.** Can you describe that strategy?

11 **A.** I would simply put -- simply put, I would say, we wanted
12 to focus on content that you couldn't get anywhere else
13 initially so that we could get out of the gates quickly.

14 **Q.** And was there any particular economic model that the Epic
15 Games Store developed?

16 **A.** We did for third-party games. We developed what we call
17 the 88/12 split. So 88 percent to our partners and third
18 party and 12 percent would go to Epic for distribution.

19 **Q.** How was it that Epic decided on an 88/12 split?

20 **A.** Our goal with the Epic Games Store for the third-party
21 portion of the store was to provide as close as possible those
22 self-publishing economics as we could in a third party
23 multi-titled store environment.

24 **Q.** How did you decide which developers to target for bringing
25 to the store?

1 **A.** Initially on the third-party side, it was important for us
2 to get out of the gates quickly. From a commercial
3 standpoint, we wanted to make an impact.

4 We studied the PC industry. We looked at -- at this time
5 in 2016, 2017, thousands of titles would come out every year
6 on PCs, upwards of 20,000 titles. When you look at the
7 revenue in the PC space, despite having that many releases in
8 a year, the top 100 titles in a given year will generate
9 somewhere between 55 and 60 percent of the revenue in a given
10 year.

11 So we felt that that was a manageable scope to target
12 content. So we felt if we could identify the next top 100
13 games, that we could have a real strong offering from a peal
14 of content you can't get anywhere else and bring those to a
15 store. Sorry.

16 **Q.** How did you roll this out to those particular developers?

17 **A.** We had a lot of talks. First, we had a lot of strategy
18 talks about what we were doing and when. The first thing we
19 wanted to do was socialize the idea with some close partners.

20 So our Biznet Team and myself did that with just, I would
21 say, under 10 developers that Epic was close to. We had a
22 very enthusiastic response. Much more so than we expected.
23 So we started there. That was in July of 2018.

24 After getting those enthusiastic responses, we decided
25 that we would want to test it with a bigger audience. So in

1 August of 2018, there -- in August every year there's an
2 industry trade show called Gamescom that's held in Cologne,
3 Germany.

4 We decided that we would try and get with as many
5 developers as we could to present the idea of the Epic Games
6 Store with the idea of understanding when we should launch and
7 how many people would be excited to join us on the
8 exclusive -- exclusivity side and third party.

9 For a period of four days, we had about a hundred meetings
10 with a hundred teams, and I would say that the response that
11 we had to the small sample size back in July was echoed from
12 the meetings we had in August. We had some very enthusiastic
13 potential partners in front of us.

14 **Q.** Did you encounter any hesitation by any developers over
15 coming to the store?

16 **A.** Yes.

17 **Q.** How did you address that?

18 **A.** The -- there's -- we talked about the concerns with Steam.
19 They weren't just about -- so I want to roll back one step to
20 provide context.

21 There is also a prevailing sentiment that Steam's dominant
22 position was something that many developers were uncomfortable
23 with, they're so dependent on Steam for their business, they
24 wanted to have some sort of diversification in their risk
25 profile and distribution.

1 So -- can you restate the question?

2 **Q.** Yes.

3 How did you address hesitation by developers over coming
4 to the store?

5 **MS. DUNN:** Your Honor, objection and move to strike
6 the testimony about the developers' sentiment.

7 **THE COURT:** So I'm going to sustain an objection as
8 to form.

9 Can you first -- so there were hesitations expressed to
10 you, or not?

11 **THE WITNESS:** There were.

12 **THE COURT:** What were the hesitations?

13 **THE WITNESS:** They were --

14 **THE COURT:** Just list them.

15 **THE WITNESS:** The primary hesitation was so much of
16 their livelihood was based on their sales on Steam on the PC
17 side, that leaving Steam to join up at the Epic Games Store
18 for a 12-month exclusive period at Launch was anxiety
19 provoking.

20 **THE COURT:** Any other hesitations?

21 **THE WITNESS:** That was it.

22 **THE COURT:** So now you can answer the question about
23 what you did. And it's not for the truth but what he actually
24 did in response.

25 **MS. DUNN:** Thank you, Your Honor.

1 **THE WITNESS:** We expected this issue, and we
2 presented our potential partners with what we called the idea
3 of a recoupable minimum guarantee in exchange for joining the
4 Epic Games Store for a 12-month exclusive.

5 Recoupable guarantee is based on what we expect their
6 12-month sales on Steam would be, so we can remove that
7 anxiety from the conversation and as -- help them kind of
8 enthusiastically back on Epic Games Store.

9 **Q.** Can you explain for the Court how a recoupable minimum
10 guarantee deal would work?

11 **A.** Okay. So let's, as an example, just say there's a game
12 that we run comps on, and comps are sort of looking at what we
13 expect a game would do based on the information that we have;
14 let's say that game would have 10 million in revenue to the
15 developer after the 70/30 split. The minimum guarantee offer
16 would be \$10 million. It would recoup based on actual sales
17 on the Epic Games Store at their rev share on the Epic Games
18 Store 88 percent.

19 Starting -- we start to pay installments on the minimum
20 guarantee to our developers after the game releases. And we
21 do that in four quarterly chunks. So \$10 million minimum
22 guarantee, first quarter we pay two and a half million.

23 If the game ships and sells above that first quarterly
24 payment, we would pay them whatever that -- so say it's
25 \$4 million that would be due to the developer, we would still

1 pay them the \$4 million and they would have recouped against
2 that 2.5 million and into the next payment.

3 By the end of the first year, we will have paid the
4 entirety of that \$10 million to the developer and most of our
5 deals were recouped for the lifetime of the product on the
6 Epic Games Store. So for several years.

7 **Q.** If you were a PC developer, how challenging is it to
8 develop a game for sale on multiple PC storefronts?

9 **MS. DUNN:** Objection to form.

10 **THE COURT:** I'm not sure I understand the question.

11 Sustained.

12 **BY MR. CLARKE:**

13 **Q.** Have you ever had any discussions with developer partners
14 about the difficulties in developing a game for multiple PC
15 storefronts?

16 **A.** Yes.

17 **Q.** And do you have an understanding for whether they
18 encounter any difficulties in developing games for multiple PC
19 storefronts?

20 **A.** If they set out to be on multiple storefronts, it's pretty
21 straightforward.

22 **Q.** So with the minimum guarantee deals, when Epic first began
23 signing these, did it expect to incur losses as a result of
24 these deals?

25 **A.** So we don't -- I don't view them as losses. We view them

1 as investment in our content strategies. We are like a
2 startup within Epic. So we expected to make investment; we
3 did not expect that they would all recoup starting with an
4 audience of nearly zero in a third-party business.

5 **MR. CLARKE:** Your Honor, I would like to show PX2469,
6 Exhibit 2469.

7 May I approach the witness with a copy, Your Honor?

8 **THE COURT:** You may.

9 **MR. CLARKE:** Do you have it open?

10 **THE WITNESS:** I do.

11 **BY MR. CLARKE:**

12 **Q.** Mr. Allison, do you recognize this document?

13 **A.** I do.

14 **Q.** What is this document?

15 **A.** This is a strategy deck review for our sea level
16 leadership and our team.

17 **Q.** Do you understand who prepared this document?

18 **A.** I do.

19 **Q.** Who?

20 **A.** Our FP&A group.

21 **Q.** Does Epic regularly prepare analyses such as this in the
22 ordinary course of business for its senior leadership?

23 **A.** Yes.

24 **MR. CLARKE:** I would like to offer the document in
25 evidence.

1 **MS. DUNN:** No objection.

2 **THE COURT:** It's admitted. 2469.

3 (Pleading's Exhibit 2469 received in evidence)

4 **BY MR. CLARKE:**

5 **Q.** Mr. Allison, turn to the page marked 2469.6.

6 What is this page show?

7 **A.** This is a page that's updating on the current approach to
8 our minimum guarantee deals as of this meeting in June of
9 2020.

10 **Q.** And I would like to refer you to the final line on this
11 page.

12 Do you see that?

13 **A.** I do.

14 **Q.** Can you read it for me?

15 **A.** MG commitment by release year.

16 **Q.** Do you know what that refers to?

17 **A.** I do.

18 **Q.** What does that refer to?

19 **A.** The amount -- the financial amount of the new commitments
20 that we expected to make to third-party developers in exchange
21 for coming to the Epic Games Store exclusively in a given
22 year.

23 **Q.** And can you explain what those amounts were?

24 **A.** From -- on this page?

25 **Q.** Yeah. What information is this providing?

1 **A.** This is showing actuals from 2019. And this is June of
2 2020. So that number 448 is an expected number. That's
3 actually a bit less in reality at this point. And the expected
4 continued reduction in commitments over a period of five
5 years.

6 **Q.** Why was there an expected continued reduction of
7 commitments over a period of five years?

8 **A.** The store was just about, I think, 18 months old at this
9 point, and we had more success than we expected faster than we
10 expected. We had a bunch of happy partners who were bringing
11 good -- a good amount of content in what we call simultaneous
12 shipment or nonexclusively to a store.

13 And we were also learning a lot about the practice that --
14 we're sharpening around, you know, volume isn't necessarily
15 what we need. We need strategic -- so I think more focus on
16 top 20 titles than top 100 titles at this point because we
17 learned quite a bit over our first 18 months.

18 **Q.** Aside from minimum guarantees, does the Epic Games Store
19 make any other investments to acquire content?

20 **A.** We do.

21 **Q.** What investments does it make?

22 **A.** Epic has two other content verticals that answer the
23 strategy of content you can't get anywhere else. Epic has our
24 first-party games, so we have *Fortnite*, *Rocket League Now*, and
25 we just completed the acquisition of a studio in Q1 for a game

1 franchise called *Fall Guys*. The PC versions of those games
2 are expected to be exclusive to the Epic Games Store forever.

3 We also have what's called second party content or we can
4 call it publishing. Publishing is a new group that is in my
5 organization that fully funds the development of projects on
6 multiple platforms; so PC, console, and in some cases mobile.
7 The PC skew of those games are expected to be lifetime
8 exclusives on the Epic Games Stores as well. We have over 14
9 projects in development with the Epic Games publishing at the
10 moment.

11 **Q.** We talked about developers.

12 How did the Epic Games Store attract consumers to the
13 store?

14 **A.** The content-you-can't-get-anywhere-else strategy is for
15 getting players to the store so that we're -- it's really for
16 us, on the third party, it was how a developer could
17 experience the economics, the self-publishing economics for
18 all their players buying the game here.

19 So content-you-can't-get-anywhere-else. And in addition,
20 we launched the store with a program we call a free games
21 program. Pretty sexy name. But in my past at my job at
22 Telltale, we had participated in free games programs on
23 console. So Xbox and PlayStation has a free games program
24 that they have been running for over five years where they
25 give somewhere between two and four games away per month as a

1 user acquisition activity.

2 I had experienced the numbers at Telltale. We had done
3 about four of these. And so the theorem for the Epic Games
4 Store is these would be pretty. It's never been done on PC.
5 If we can do it weekly, we would see some really powerful user
6 acquisition for the store. And so we also launched in
7 December of 2018 with our first free game.

8 **Q.** How many apps are currently available today on the Epic
9 Games Store?

10 **A.** About 500.

11 **Q.** Do you ever turn down apps on the store?

12 **A.** Yes.

13 **Q.** How do you decide what apps to turn down?

14 **A.** We have right now the capacity to maybe bring on 40 titles
15 a month under the current structure of the group, and we
16 decide based on what exclusives are coming and generally led
17 by commercial decision making.

18 **Q.** How many developers distribute their apps on the Epic
19 Games Store today?

20 **A.** A little over a hundred.

21 **Q.** How many regular users does the Epic Games Store have
22 today?

23 **A.** We have 180 million registered PC accounts and over 50
24 million monthly active users. So these are users who access
25 our launcher in any given month.

1 Q. When you say "registered PC accounts," are you including
2 Mac in that number or is that specific to PC?

3 A. PC and Mac. Sorry.

4 Q. If you were to list the top digital storefronts in order
5 of sales today, do you know where Epic would fall on that
6 list?

7 A. A clear and strong number two.

8 Q. Mr. Allison, you referenced an 88/12 revenue split.
9 Do you recall that?

10 A. Yes.

11 Q. How does the Epic Games Store collect its 12 percent
12 commission?

13 A. For paid transactions on the Epic Games Store done either
14 through the web because you can't access the game from -- you
15 can access -- pardon me. The store from a website and
16 transact, you just can't play from there. Or from the
17 Launcher using Epic payments.

18 Q. Does the Epic Games Store collect any kind of a commission
19 for in-app purchases on apps offered through the store?

20 A. We do.

21 Q. How does the Epic Games Store collect that commission?

22 A. So Epic payments can also be -- I'll probably use the term
23 "hooked up" into a game that's being published on the Epic
24 Games Store. A developer can use the Epic payment system to
25 facilitate the transactions of in-game purchases but it's

1 optional.

2 **Q.** Why is it optional?

3 **A.** It's a belief system that we have that these payment
4 systems should be optional. We had -- let me scroll back.

5 In 20-- -- towards the end of 2019, we had a few developers
6 who we were trying to get their games to the store. They're
7 significant back catalog games that had micro transaction
8 structures, and that was a hurdle for them to make the leap
9 and do the development work.

10 And since we believe in it, we said this would be fine and
11 we changed the policy to allow some of those folks to get
12 their games onto the store.

13 **THE COURT:** You changed the policy when?

14 **THE WITNESS:** In December of 2019.

15 **THE COURT:** Had Project Liberty been launched or not?

16 **THE WITNESS:** I don't believe so.

17 **BY MR. DOREN:**

18 **Q.** Mr. Allison, if a developer decides to use its own payment
19 processor, does Epic take a 12-percent commission on in-app
20 purchases through that particular developer's apps?

21 **A.** No.

22 **Q.** Does the Epic Games Store offer any titles that are free
23 to download?

24 **A.** Yes.

25 **Q.** Does the Epic Games Store collect any kind of commission

1 on those titles?

2 **A.** If they use Epic payments for their in-game transactions
3 or if they set up what we call real money transactions or RMT,
4 some of those games will put catalog items like their virtual
5 currency or cosmetic packs as things you can buy from the
6 storefront, then we will. But in either case, they need to
7 either be on the storefront or using Epic payments.

8 **Q.** Do any developers choose not to use Epic's payments
9 processing features today?

10 **A.** Yes.

11 **Q.** And can you identify those developers?

12 **A.** A couple of examples. One would be Wizards of the Coast
13 for the game Magic Gathering Arena.

14 **THE COURT:** Okay. I missed that entirely. Say that
15 again.

16 **THE WITNESS:** Wizards of the Coast is a publisher and
17 the game is Magic Gathering Arena. And then Ubisoft is a
18 partner of ours with multiple titles on the storefront. And
19 they use their own payments for their in-game transactions on
20 those games.

21 **BY MR. CLARKE:**

22 **Q.** Do you have an understanding for how much third-party
23 developers have made distributing their apps through the Epic
24 Games Store to date?

25 **A.** About half a billion.

1 Q. Do you have an understanding for how much Epic has made to
2 date from first-party titles sold through the store?

3 A. Around 800 million.

4 Q. What services does the Epic Games Store offer developers?

5 A. I would say -- let's start with the developer portal,
6 which is kind of home base for how a developer gets their game
7 published on the Epic Games Store. It's the place where they
8 set up their product, put in their achievements, set up their
9 product page, push -- upload their code or their updates.

10 It's a place where they can see their -- some game
11 analytics that we provide them, like play time, monthly
12 active users, daily active users, and retention. It's a place
13 where they can go see their daily sales.

14 We have features built into the platform to help them in
15 their marketing. One of them is called Support A Creator
16 which is like an affiliate program where it -- a developer can
17 choose to give a portion of their sales to creators to make
18 videos to help kind of market their products on places like
19 YouTube and Twitch. The way that works is -- I'll just use an
20 example. Say a game says we're going to turn our Support a
21 Creator payment up to 10 percent.

22 And then there's some amount of creators will make videos
23 on YouTube or Twitch, and then their videos will say, hi, I'm
24 on Epics Support a Creator program, put in my gamer tag when
25 you purchase, and I get a cut. It's a marketing feature that

1 leans into today's marketing climate for games.

2 We also have merchandising services on the platform that
3 are -- to cover our marketing services like our Carousel which
4 is like premium positioning and then in a variety of locations
5 throughout the store for promoting games and their upbeats.

6 We also do a lot of things outside the store for our
7 developers like seasonal events and marketing at trade shows.

8 **Q.** Mr. Allison, does the Epic Games Store do anything to
9 protect account security?

10 **A.** We do.

11 **Q.** Can you describe what it does to protect account security?

12 **A.** I would say the Epic accounts are bigger than the Epic
13 Games Store but I can talk about what I -- the Epic game
14 account and the security.

15 If you're coming to the Epic Game Store for the first
16 time, signing up for a new account, you'll sign up for an
17 account, and we use email verification to validate that the
18 user has a legitimate email.

19 Once an email is in use tied to an account, we protect the
20 account from credential stuffing with technologies like
21 Captcha which are designed to prevent bots which are automated
22 attacks on accounts from getting through.

23 We have an extra layer of security that we provide to our
24 users called multifactor authentication. This is where a user
25 can choose to take a second-step verification for any log-in

1 on their account using an additional email, text messaging, or
2 authentication app like, for example, Google Authenticate.

3 After -- in addition to all that, we have what we call the
4 InfoSec team. It's an information security team. They are
5 looking after our ecosystem security. They are in what we
6 call defensive mode all the time, monitoring the ecosystem for
7 unusual transactional activity.

8 So it could be things like a single account buys a game in
9 four different geographies in a day. It could be too many
10 purchases in a day. Those rules are changing all the time,
11 but they're looking for any anomalies, and then they react to
12 investigate.

13 That's an example.

14 **Q.** Does the Epic Games Store ever experience any external
15 threats to account security?

16 **A.** I would say the Epic Games Store has experienced the same
17 kinds of what we call bad actors at times who are trying to
18 credential stuff or attack our systems and test our systems
19 that any platform or major outfit like Facebook would see.

20 **Q.** Does the Epic Games Store offer any parental control
21 settings?

22 **A.** We do.

23 **Q.** What do those parental control settings do?

24 **A.** Our parental control allows a parent to set up a pin-based
25 system to block out other users from purchasing games or

1 accessing content.

2 **Q.** Does the Epic Games Store do anything to protect consumers
3 from harmful software?

4 **A.** Yes.

5 **Q.** What steps does the Epic Games Store take to do that?

6 **A.** Every build that's uploaded or every update that's
7 uploaded or -- and every update that's loaded is run through a
8 malicious software virus scan.

9 **Q.** Does the Epic Games Store do anything to identify the --
10 to verify the identity of developers on the store?

11 **A.** Right now our developer pool is small. So, yes, we work
12 closely with our developers. We work with them on their
13 developer and distribution agreements. We work with them to
14 get their stores live.

15 So right now we are at a scale where we are very close to
16 all of our developers. So the answer is a lot -- we have
17 strong personal relationships with the current development
18 community on the store.

19 **Q.** Does the Epic Games Store permit objectionable content on
20 the store?

21 **A.** No.

22 **Q.** How does the Epic Games Store ensure that objectionable
23 content does not make it onto the store?

24 **A.** Part of the malicious software scan is looking for using
25 AI pornographic imagery. In addition to that, if we had any

1 complaints, our moderation team, which is part of the InfoSec
2 team, would be reactive and doing takedowns.

3 Q. Have there ever been any known instances of malware on the
4 Epic Games Store?

5 A. Not to my knowledge.

6 Q. Has the Epic Games Store ever had any issues with
7 digitally-pirated content appearing on the store?

8 A. Not to my knowledge.

9 Q. Have there ever been any issues with fraud on the Epic
10 Games store?

11 A. Yes.

12 Q. Can you describe that?

13 A. Yes.

14 We had a partner in Ubisoft in our first three months on
15 the store, we signed the agreement with Ubisoft in February
16 and their title launched in March. This is when we were in
17 our fourth month.

18 Ubisoft and Epic agreed to do something aggressive and
19 innovative, and that Ubisoft has a store, I think we talked
20 about it earlier called You Play. Ubisoft wanted to do what
21 we call dual entitlement with the Epic Game Store. And what
22 that means, every purchase on the Epic Games Store would also
23 generate an entitlement to the same game on the You Play
24 store.

25 We were able to facilitate that in an automated fashion

1 through account linking but one of the exposures we had was
2 what happens when someone refunds the title on the Epic Games
3 Store.

4 The two companies agreed to have a manual process. The
5 actual -- the actual scale of sales and refunds grew over time
6 as we had again a group of bad actors come in and start to
7 poke around at our refund policy. They started buying the
8 game on the Epic Games Store, getting refunds and continuing
9 to play and access the game on the You Play store.

10 The process we put in place that was manual broke down
11 because of the scale. Our group came in as soon as knew about
12 it, we halted sales of the games for about six weeks and put
13 the automated process in place, turned it back on and we
14 haven't had any issues since.

15 **Q.** Who was the victim of that fraud?

16 **A.** In theory it could have been both us and Ubisoft, but the
17 Epic Games store and Epic in general paid Ubisoft for every
18 unit that was fraudulently refunded and Epic was basically the
19 company with exposure there.

20 **Q.** And does that vulnerability continue to exist today?

21 **A.** It does not.

22 **Q.** Does Epic take security seriously?

23 **A.** Yes.

24 **Q.** Why?

25 **A.** It's really hard to successfully run a digital business if

1 you don't have strong security for your partner and your
2 players.

3 **Q.** Mr. Allison, is the Epic Games Store profitable today?

4 **A.** No.

5 **Q.** Do you have an understanding for why the Epic Games Store
6 is not profitable today?

7 **A.** Yeah. As basically a startup within Epic that has got
8 lofty goals, we are in a period of growth and investment.

9 **Q.** Does the Epic Games Store expect to be profitable?

10 **A.** Yes.

11 **Q.** If I could direct your attention back to the exhibit.
12 This is PX2469. If you turn to page 2469.7?

13 **THE COURT:** We will be breaking here soon. So figure
14 out when is a good time.

15 **MR. CLARKE:** I have maybe 10 more minutes, Your
16 Honor, but I'm happy to break first.

17 **THE COURT:** So we don't have ten minutes. Do you
18 want to ask about this before or after the break?

19 **MR. CLARKE:** Why don't we do it after the break.

20 **THE COURT:** Okay. Let's go ahead and we will stand
21 in recess for a second break until 1:15. We will stand in
22 recess. Thank you.

23 (Recess taken at 12:35 p.m.; resumed at 1:15 .m.)

24 **THE COURT:** Okay. We're back on the record. The
25 record will reflect the parties are present. Mr. Allison is

1 on the stand.

2 And Mr. Clarke; right?

3 **MR. CLARKE:** Yes, ma'am. Yes, Your Honor.

4 **THE COURT:** You may proceed.

5 **MR. CLARKE:** Thank you.

6 **DIRECT EXAMINATION (RESUMED)**

7 **BY MR. CLARKE:**

8 **Q.** Mr. Allison, before lunch, I had asked you a few questions
9 about profitability; is that correct?

10 **A.** Yes.

11 **Q.** I would like you to turn to PX2469.7, please. Let me know
12 when you're there.

13 **A.** I'm there.

14 **Q.** Thank you.

15 Could you explain what appears on this page?

16 **A.** This is a view of a P&L isolated on our third-party
17 business and second-party business with Epic Games Publishing
18 looking at about five years. It shows us being profitable in
19 2024.

20 **Q.** When you say isolated on the third-party business, can you
21 explain what you mean by that?

22 **A.** Yes. So the Epic Games Store is everything Epic
23 distributes on PC, inclusive of our first party, second party
24 and third party, but we, in the first year, year and a half,
25 have really been sharp in looking at how the third-party

1 business is doing as we optimize our strategy, so this is just
2 a view that's very focused on our third-party titles and how
3 the recent addition here of the Epic Games Publishing efforts
4 may impact that.

5 **Q.** And does this include any sort of operating costs for the
6 Epic Games Store?

7 **A.** It does.

8 **Q.** Can you explain which costs are included here?

9 **A.** All the costs of sales for things like hosting, payment
10 processing. It includes all of our directly-assigned staff to
11 Epic Games Publishing and Epic Games Store, and it includes
12 all of outsourced development for our -- and we have several
13 partners who help us build the platform.

14 **Q.** Based on this document, when does Epic expect the
15 third-party component of Epic Games Store to first turn a
16 profit?

17 **A.** In 2024.

18 **Q.** If you were to include the first-party content in this
19 analysis, would that change the result?

20 **A.** It would.

21 **Q.** How would it change the result?

22 **A.** We would have a profitable year either in 2022 or 2023.

23 **Q.** Do you expect the third-party component of the store to
24 eventually recoupe the upfront investments in minimum
25 guarantees that Epic has made?

1 **A.** Yes, we do.

2 **Q.** How is the Epic Games Store current financial performance?

3 **A.** Well, we just ended our first quarter. We're about 15
4 percent ahead of plan overall, and just to do some comparables
5 to Q1 of 2020 versus Q1 of '21, the third-party business is up
6 a hundred percent year over year and our first-party business
7 is up a 113 percent year over year.

8 **Q.** Have there ever been any discussions about expanding the
9 Epic Games Store onto iOS?

10 **A.** Yes.

11 **Q.** Why hasn't Epic launched the Epic Games Store on iOS?

12 **A.** Current policies around content delivery, networks,
13 delivering code, and using payments would preclude us from
14 spinning up an effort there.

15 **Q.** When you refer to current policies, whose policies are you
16 referring to?

17 **A.** Apple.

18 **Q.** What commission rate would the Epic Games Store charge if
19 it was on iOS?

20 **A.** I would expect for third-party partners in an Epic Games
21 Store on iOS that we would charge 88/12.

22 **Q.** Has Epic tried to negotiate with Apple concerning
23 launching the Epic Games Store on iOS?

24 **A.** I believe that Tim, our CEO, has socialized the idea at a
25 very high level with Apple execs, but I have not been

1 involved.

2 **Q.** How, if at all, does not being on iOS affect the Epic
3 Games Store?

4 **A.** Mobile devices have billions of players at the end of the
5 screen. It's an incredibly large total addressable market.
6 We are accompany that is aggressive in going after growth
7 sectors. We are not able to go after that addressable market
8 with the growth plan.

9 **MS. FORREST:** Thank you. I have no more questions at
10 this time.

11 **THE COURT:** Cross.

12 **MS. DUNN:** Your Honor, we have binders for the Court
13 and for the witness. May I approach?

14 **THE COURT:** You may.

15 **MS. DUNN:** Thank you.

16 **THE COURT:** If you have an extra, you can hand it to
17 the law clerks. That would be great.

18 **MS. PHILLIPS:** May I approach, Your Honor?

19 **THE COURT:** Thank you, yes.

20 **MS. DUNN:** Your Honor, may I proceed?

21 **THE COURT:** You may. I'm sorry, Ms. Dunn. I haven't
22 had my third, fourth cup of coffee yet.

23 **MS. DUNN:** That's okay. We will do our best to wake
24 everyone up.
25

CROSS-EXAMINATION

BY MS. DUNN:

Q. Good afternoon, Mr. Allison. It's good to meet you.

You said that you're vice-president and general manager of the Epic Games Store; is that right?

A. Yes.

Q. And when a consumer goes to the internet and searches Epic Games Store, what comes up is epicgames.com? You're aware of that?

A. Yes.

Q. Okay. And that's the website, and you're familiar with the website; correct?

A. Yes.

Q. Okay.

Your Honor, we would like to put the website up as a demonstrative to talk to the witness about it, if that's okay with the Court.

THE COURT: It is.

BY MS. DUNN:

Q. All right. So, Mr. Allison, the website is the way that the store reaches its consumers; correct?

THE COURT: So we need to just -- go ahead. We do need to give --

THE CLERK: Okay. Switched over. It's switched over.

1 **THE WITNESS:** I'm not seeing it yet.

2 **BY MS. DUNN:**

3 **Q.** That's okay. We can talk while they are working on that.

4 **A.** It's one of the ways we reach our players, customers.

5 **Q.** And we're entering epicgames.com, and we will go into the
6 website.

7 And so the first thing that we see when we go to the
8 website is the home page. Do you see that?

9 **A.** I do.

10 **Q.** Okay. And at the top of the home page, there are five
11 tabs: One called "store," one called "news," one called
12 "FAQ," one called "help" and one called "Unreal Engine." Do
13 you see that?

14 **A.** I do.

15 **Q.** And on the storefront page, there are two tabs, one that
16 says "discover" and one that says "browse"?

17 **A.** Yes.

18 **Q.** All right. So let's scroll down on the discover tab.
19 There is a category that says "games on sale." Do you see
20 that?

21 **A.** Yes.

22 **Q.** And under "games on sale," there is something called
23 Warframe, Hired Gun, Hundred Days, Skate City, Lumberjack's
24 Dynasty. Those are all games; correct?

25 **A.** Yes.

1 **Q.** If you scroll down further, there is a category that says
2 "free games," and the two things under free games are games;
3 correct?

4 **A.** Yes.

5 **Q.** All right. If you scroll down just a little bit further,
6 there is a category called "new and trending," and under "new
7 and trending," there is "new releases," "top sellers" and
8 "coming soon." Do you see that?

9 **A.** Yes.

10 **Q.** All right. So let's go to new releases.

11 Under new releases, you see Skate City, R-Type Final 2,
12 MotoGP 21, Spelldrifter, and Ashwalkers. Do you see that?

13 **A.** Yes.

14 **Q.** And those are all games; correct?

15 **A.** Yes.

16 **Q.** Okay. So if you go to the middle column, that says "top
17 sellers." You see Rocket League, Hood Outlaws & Legends,
18 Grand Theft Auto V, Idle Champions of Forgotten Realms, and
19 Assassin's Creed Valhalla. Those are all games; right?

20 **A.** Yes.

21 **Q.** If you go to "view more," this takes you to Top 20, and I
22 don't know if you know this, but there is actually 25 under
23 the Top 20.

24 And if Mr. Spalding scrolls down, you will see these are
25 all games; correct?

1 **A.** Yes.

2 **Q.** All right. And so if you go back to the home page under
3 "new and trending," there is something called "coming soon."
4 And so everything under "coming soon" is also a game; correct
5 sir?

6 **A.** Yes.

7 **Q.** All right. So everything that is a new release and
8 everything that is coming soon that your consumers see when
9 they look at the website is a game; is that right?

10 **A.** Today, yes.

11 **Q.** Okay. And at the top of this home page, there is
12 somewhere that says "search," that consumers can search. Do
13 you see that?

14 **A.** Yes.

15 **Q.** And if you just start typing in there, it -- what comes up
16 says "search all games"; correct?

17 **A.** Yes.

18 **Q.** And it doesn't say "search all apps," does it?

19 **A.** It does not.

20 **Q.** Right. All right.

21 So let's keep going. The next tab is the news tab at the
22 top. And if you go -- look at the top news items, those are
23 also games; correct?

24 **A.** Today, yes.

25 **Q.** Okay. And if you go to the help tab, the first thing you

1 see in huge letters says, "Welcome to Epic Games Player
2 Support." You see that; correct?

3 **A.** Yes.

4 **Q.** And you called your consumers today players?

5 **A.** I have.

6 **Q.** That's right. And these are instructions for those
7 consumers. All right.

8 If we scroll back up, there is something at the top that's
9 called "Unreal Engine," and we've discussed in this trial what
10 *Unreal Engine* is. If you click "Unreal Engine," you see it
11 takes you to an entirely differently website called
12 unrealengine.com. Do you see that?

13 **A.** Yes.

14 **Q.** And so let's knock out the last ones.

15 If you go back, Mr. Spalding, and if you go to the tab
16 that says FAQ on the Epic Games website.

17 So if consumers have questions, this is where they would
18 go; correct?

19 **A.** Yes.

20 **Q.** Right. And the first question is, "What is the Epic Games
21 Store?"

22 "The Epic Games Store is a curated digital storefront for
23 PC and Mac; true? Right?

24 **A.** Yes.

25 **Q.** "It is designed with both players and creators in mind";

1 correct?

2 **A.** Yes.

3 **Q.** And "it's focused on providing great games for gamers and
4 a fair deal for game developers." That's true?

5 **A.** That's what it says. That's what it says.

6 **Q.** That's what it says. And it's true; correct?

7 **A.** Yes.

8 **Q.** You agree.

9 All right. So if you go to the next question, it says,
10 "Where can I download the Epic Games Store?" Do you see that?

11 **A.** Yes.

12 **Q.** Right. And it says, "Visit the Epic Games Store page at
13 epicgames.com. Go to the upper right-hand corner and click
14 'get Epic Games.' This is the only place to safely download
15 the installer for the Epic Games Store. Do not trust other
16 sources as they are likely unsafe."

17 So Epic wants to make sure that consumers only download
18 from a trusted and safe place; correct?

19 **A.** Yes.

20 **Q.** Because if you're going to download software, trust is
21 important. You would agree with that?

22 **A.** Safety and security is important. I guess trust can be as
23 well.

24 **Q.** Right. And particularly if you are going to download
25 software; correct?

1 **A.** Yes.

2 **Q.** Okay.

3 And, by the way, while we are on this topic, are you aware
4 of any data breaches that have happened at Epic?

5 **A.** Can you give me more context?

6 **Q.** Sir, are you aware of any data breaches at Epic?

7 **A.** No.

8 **Q.** You're sure?

9 **A.** I need more context.

10 **Q.** Okay. All right.

11 So if we could go back to the home page, Mr. Spalding.

12 If you look under "browse," there's a list of filters that
13 come up on the side. You can filter by price and category and
14 features. Do you see that?

15 **A.** Uh-huh. I do.

16 **Q.** And one of the features you can filter by is called
17 "competitive"; correct?

18 **A.** Yes.

19 **Q.** And all of these things do not say "competitive" because
20 some games are not competitive. That's true?

21 **A.** They -- yes. They don't fit that category.

22 **Q.** Right. For example, just one example, there is a game
23 category called RPG which stands for a Role Playing Game;
24 right?

25 **A.** Yes.

1 **Q.** Right. And those are games where -- like Oregon Trail or
2 The Sims where it's not competitive?

3 **A.** It's where they're not -- potentially not competitive.
4 Some RPGs might have competitive modes and therefore qualify
5 for the filter.

6 **Q.** Right. But we can agree not all games are competitive?

7 **A.** No.

8 **Q.** And there are many kinds of different games listed here?

9 **THE COURT:** No, they are not, or you are agreeing
10 with that?

11 **THE WITNESS:** I'm sort of getting lost in the --
12 what -- are we back in the competitive category or on the RPG
13 category?

14 **BY MS. DUNN:**

15 **Q.** In general, there are games that are competitive; correct?

16 **A.** Yes.

17 **Q.** And there are types of games that are not competitive?

18 **A.** Yes.

19 **Q.** Great.

20 Okay. And you testified on direct that before the Epic
21 Games Store opened, you had spoken to a couple of non-game app
22 developers about coming to the store. Do you remember that?

23 **A.** After the game store opened, but, yes.

24 **Q.** And you also testified that technically nothing different
25 would be required to put a game app in there than to put a

1 non-game app in there?

2 **A.** In many cases, yes, yes.

3 **Q.** All right. And yet the first non-game app didn't come to
4 the Epic Games Store until December of 2020, after this
5 lawsuit was filed; isn't that correct, sir?

6 **A.** I believe that's correct, yes.

7 **Q.** Right. And that app was Spotify, and -- is that correct?

8 **A.** Yes.

9 **Q.** Right. And Spotify is a member of the Coalition of App
10 Fairness?

11 **A.** That's my understanding.

12 **Q.** All right. And a handful of others were added two weeks
13 ago. You know about that?

14 **A.** I do.

15 **Q.** All right. Epic has also, in addition to its website, a
16 strong social media presence for the store; you would agree?

17 **A.** Yes.

18 **Q.** You post sometimes on Twitter and Facebook and Instagram.

19 If you look in your binder at Defense Exhibit 3399?

20 **A.** I can see it on the screen. Okay.

21 **Q.** Okay. This is a document from September of 2020, also
22 shortly after this lawsuit was filed, and it says "Weekly
23 Store Strategy Meeting Agenda."

24 **A.** Yep.

25 **Q.** And you're familiar with this document, sir?

1 **A.** I am.

2 **Q.** All right.

3 Your Honor, we move to admit DX3399.

4 **THE COURT:** Any objection?

5 **MR. CLARKE:** No objection, Your Honor.

6 **THE COURT:** Admitted.

7 (Defense Exhibit 3399 received in evidence)

8 **BY MS. DUNN:**

9 **Q.** And if you will turn to page 4 of this document.

10 And, Mr. Spalding, it would be great if you could blow up
11 the text.

12 This shows a screenshot of the Epic Games Instagram page.

13 **A.** Yes.

14 **Q.** And this one is from that same time period; correct?

15 **A.** Yes.

16 **Q.** And this says, "From day one, we've set out to be a great
17 digital storefront for PC and Mac games, designed with both
18 players and creators in mind. Whether you're here for the
19 news, the game trailers, the free games, or just for fun,
20 thank you for being there."

21 That's what you told your five million Instagram
22 followers; true?

23 **A.** True.

24 **Q.** Then it goes not on to say, "From all of us here at the
25 Epic Games Store, we heart games and we heart you." And

1 that's true. You do heart games, and you wanted to make sure
2 that the consumers knew that about you; right?

3 **A.** This is the message that we gave our players for hitting
4 five million followers, yes.

5 **Q.** Right. And that's the message that you're sending to the
6 market; correct?

7 **A.** On this day, yes.

8 **Q.** Correct. All right.

9 If you would turn, sir, to DX5536 in your binder.

10 And, Your Honor, this is a newly-marked exhibit that is in
11 your binder and in a binder of Epic counsel.

12 **THE COURT:** Which one? 5536?

13 **MS. DUNN:** 5536.

14 **Q.** Mr. Allison, this is also something that is posted on the
15 Epic Games Store website. It's a beginners guide to *Fortnite*,
16 and it appears at the news tab. Do you see that?

17 **A.** I do.

18 **Q.** And you're are familiar with this?

19 **A.** Vaguely.

20 **MS. DUNN:** Your Honor, we move to admit DX5536.

21 **THE COURT:** Any objection?

22 **MR. CLARKE:** No objection, Your Honor.

23 **THE COURT:** Admitted.

24 (Defense Exhibit 5536 received in evidence)
25

1 **BY MS. DUNN:**

2 **Q.** And so the date on this beginners guide is September 2nd
3 of 2020. Do you see that?

4 **A.** I do.

5 **Q.** Also after this lawsuit was filed; you're aware?

6 **A.** I am.

7 **Q.** Okay. And this is how Epic describes *Fortnite* to the
8 public. You would agree with that?

9 **A.** I have no opinion.

10 **Q.** It's on your website, sir.

11 **A.** This is what this -- this is how this document describes
12 *Fortnite*.

13 **Q.** Okay. And directing your attention then to page 1, the
14 post that's from the *Fortnite* team explains to consumers that
15 there are four major game modes in *Fortnite*, together offering
16 something for every kind of player. The four game modes are
17 Battle Royale, Party Royale, Creative, and Save the World.
18 That's true; right?

19 **A.** Yes.

20 **Q.** Right. If you look at page 2, I think we all know what
21 Battle Royale is so I'm not going to spend time there, but
22 this post from the Fortnite team explaining what *Fortnite* is
23 saying that Party Royale Game Mode is a mode within Battle
24 Royale. Do you see that?

25 **A.** I do.

1 **Q.** And then it says, "Attractions include aerial obstacle
2 courses, boat races, movies, and even live concerts from top
3 artists." Do you see that?

4 **A.** I do.

5 **Q.** So all those things are included in Party Royale Game
6 Mode; correct?

7 **A.** Yes.

8 **Q.** If you direct your attention to page 3, the Fortnite team
9 describes to consumers the Creative Game Mode. It says that,
10 "It's included free with Battle Royale, puts you in charge of
11 your own island, create your own games and rules." It goes on
12 to say, "It gives you the tools to design games both simple
13 and complex. And when you're not creating, experience games
14 made by your friends or others in the *Fortnite* community." Do
15 you see that?

16 **A.** I do.

17 **Q.** And that's accurate?

18 **A.** I believe so.

19 **Q.** Okay. All right.

20 Mr. Allison, you talked a little bit about in the 1990s
21 and the early 2000s how games were distributed, and that was
22 primarily at physical stores; correct?

23 **A.** Correct.

24 **Q.** PC games were sold at stores like Egghead Software and the
25 early version of GameStop?

1 **A.** Correct.

2 **Q.** And at the time, Wal-Mart was also very big in game
3 distribution?

4 **A.** Yes.

5 **Q.** So at that time, the early version of GameStop competed
6 with Wal-Mart for games; correct?

7 **A.** Yes.

8 **Q.** But when you say that, you're not saying Wal-Mart competed
9 with GameStop in all products, are you?

10 **A.** No.

11 **Q.** All right.

12 And you also testified that Steam established the 70/30
13 split. Do you recall that?

14 **A.** Yes.

15 **Q.** And when the console makers, Microsoft and Sony, debuted
16 their digital source for the first time, they adopted the same
17 70/30 split that Steam had established?

18 **A.** Yes.

19 **Q.** And, in fact, the 70/30 revenue split that Steam
20 established is really the model that the industry uses right
21 now in most places; correct?

22 **A.** In most places, excluding PC.

23 **Q.** Okay. Excluding PCs?

24 **A.** Yes.

25 **Q.** You would agree that in most other places, the 70/30

1 revenue split is what the industry uses right now?

2 **A.** Yes.

3 **Q.** Okay. And you would also agree, sir, that the Epic Games
4 Store 12 percent commission is way outside the industry
5 standard?

6 **A.** I would not.

7 **Q.** Sir, you were deposed in this case. Do you recall that?

8 **A.** Yes.

9 **Q.** Okay.

10 **A.** I do.

11 **Q.** On that podium with you is your deposition, and I'd ask
12 the Court to look at page 53, line 16 to 22.

13 **A.** Which page again?

14 **Q.** 53, and then it's line 16 to 22.

15 **THE COURT:** Go ahead.

16 **MS. DUNN:** Thank you, Your Honor.

17 **BY MS. DUNN:**

18 **Q.** (Reading):

19 "Q. And so as part of that, Epic Games Store charged a 12
20 percent commission or an 88/12 revenue split?

21 "A. That is correct.

22 "Q. And that 12 percent commission was way outside the
23 industry standard; is that right?

24 "A. Yeah."

25 **A.** Yes. At the time.

1 **Q.** All right. So one of the ways, Mr. Allison, that the Epic
2 Games Store has sought to attract market share was to enter
3 into exclusivity agreements, meaning that games would appear
4 exclusively in the Epic Games Store; correct?

5 **A.** They would appear exclusively in the Epic Games store for
6 a limited period of time, but, yes.

7 **Q.** The hope is after consumers purchase an exclusive game,
8 the consumer will stay in the Epic Games ecosystem; is that
9 correct?

10 **A.** Yes.

11 **Q.** Right.

12 And one benefit to Epic is that the player might make
13 additional purchases in the EGS store?

14 **A.** In theory, yes.

15 **Q.** And it's okay if I call it "EGS"; right?

16 **A.** Yes.

17 **Q.** And another benefit to Epic is if the players might start
18 playing *Fortnite*; correct?

19 **A.** Sure, yes.

20 **Q.** Right. And they might make purchases within *Fortnite*?

21 **A.** They might.

22 **Q.** And that would be a benefit to Epic?

23 **A.** Yes.

24 **Q.** Okay. And so one of the reasons that Epic started the
25 Epic Games Store was to have cross-pollination between Epic's

1 different businesses; isn't that right?

2 **A.** At a high level, yes.

3 **Q.** Right. You wanted to create stickiness in the Metaverse;
4 correct?

5 **A.** We wanted to create a platform -- I'm focused on the Epic
6 store not Metaverse. So Epic Games Store is about creating a
7 multi-title environment where third-party publishers can
8 receive self-publishing economics, and we all benefit from
9 being together.

10 **Q.** Right. And you wanted customers to come into the
11 ecosystem and to stick around and to play your games?

12 **A.** We want them to play whatever games they want to play.

13 **Q.** Okay. All right.

14 And it's fair to say that these exclusivity agreements
15 cause some consternation within the developer community?

16 **A.** I wouldn't call it that, no.

17 **Q.** Okay. Well, why don't you take a look in your binder at
18 Defense Exhibit 4638. This is an email chain involving you,
19 Mr. Sweeney, and various others at Epic. It's dated August
20 3rd of 2019. Do you see this?

21 **A.** Yes.

22 **Q.** All right.

23 Your Honor, we move to admit DX4638.

24 **THE COURT:** Any objection?

25 **MR. CLARKE:** No objection, Your Honor, except that I

1 think it's possible this might be subject to a motion to zeal.

2 **THE COURT:** Okay. Is it -- is the sealing here done?
3 I see some redactions.

4 **MR. CLARKE:** I -- Your Honor, I will confirm whether
5 the sealing has already occurred or not. I noticed the
6 redactions, and I just need to -- we'll check on our side.

7 **THE COURT:** Okay. It's admitted and pending the
8 sealing issues.

9 Ms. Dunn, proceed.

10 **MS. DUNN:** Thank you, Your Honor.

11 (Defense Exhibit 4638 received in evidence)

12 **BY MS. DUNN:**

13 **Q.** This email chain begins with an email from somebody named
14 Ben Perplamps, developer of a game called *Ooblets*. Do you see
15 that?

16 **A.** Yes.

17 **Q.** Mr. Perplamps has written a draft blog post explaining his
18 company's decision to enter into an exclusivity agreement with
19 Epic?

20 **A.** Where -- what page are we on?

21 **Q.** So if you look at page 5 --

22 **A.** I don't have it on the screen.

23 **THE COURT:** It's in your binder. Do you see it?

24 **THE WITNESS:** Page 5?

25 **THE COURT:** It's the last one in your binder.

1 **THE WITNESS:** Okay. Thank you. Yep.

2 **BY MS. DUNN: --**

3 **Q.** Okay. And Mr. Perlamps draft blog post recognizes that
4 the arguments against Epic boil down to two things. Epic --
5 sorry. Epic Games Store doesn't have as many features as
6 other stores and it's anticonsumer to have exclusives. Do you
7 see that?

8 **A.** No. He's -- Ben was being sarcastic, and this entire post
9 is done in a sarcastic voice and answered in a sarcastic tone,
10 which is what Ben chose to do when he -- he is basically
11 trying to take the steam out of some of these arguments.

12 **Q.** That's right. Because he has agreed to an exclusivity
13 agreement with Epic; correct?

14 **A.** Because he believes them.

15 **Q.** Sir, please answer my question. Your counsel has time
16 after me.

17 **A.** He had an exclusivity agreement with the Epic Games Store,
18 yes.

19 **Q.** Right. And he say in his email on page 5, "I have read
20 through all the arguments against Epic and they all basically
21 come down to a couple core issues, and the first is EGS
22 doesn't have as many features as other stores, and the second
23 is it's anticonsumer to have exclusives." Do you see those
24 words?

25 **A.** I see those words as a header for the topic for the copy

1 that follows, yes.

2 **Q.** Thank you.

3 All right. And so Mr. Perplamps has written a blog post
4 in response, and if you direct your attention to the middle of
5 page 2, Mr. Sweeney says about the blog post, "I love it.
6 Maybe we'll go to hell for this, but I really like taking a
7 playful tone and not letting a bunch of humorless trolls
8 control the message for our store efforts." Do you see that?

9 **A.** I do.

10 **Q.** And when Mr. Sweeney talks about humorless trolls, he is
11 referring to consumers; correct?

12 **A.** Not necessarily, no.

13 **Q.** He's just referring to --

14 **A.** He's referring to individuals who like to go on the
15 internet -- we don't know if they're our consumers or not our
16 consumers. There are people in the internet that go onto
17 communities and like to engage in trolling.

18 **Q.** So he is referring to people who may or may not be your
19 consumers as humorless trolls?

20 **A.** That's correct.

21 **Q.** And after this blog post defending the exclusives was
22 published, the developer had to shut down its Reddit website
23 because it couldn't control the anger of the angry consumers?
24 Do you see that in this email?

25 **A.** I -- I'm -- yes. I see what you're trying to say. I

1 disagree with your characterization of it entirely.

2 **Q.** Sir, this is, I think, the point on which we can agree.

3 While there are people who love your business, there are also
4 people who criticize your business; correct?

5 **A.** I think that's true of all businesses.

6 **Q.** I do, too.

7 **A.** Sure.

8 **Q.** We agree.

9 Okay. And there are certain kinds of content that we
10 discussed that -- you can put that exhibit away. Thank you.

11 So on direct, you discussed that there are certain kinds
12 of content that the Epic Games Store will not bring to the
13 store. Do you recall that?

14 **A.** Yes.

15 **Q.** Okay. And you said that Epic will not be supportive of
16 games that are offensive or sexualized.

17 **MR. CLARKE:** Objection, Your Honor.

18 **THE WITNESS:** Were those the words I used?

19 **THE COURT:** I don't understand the objection.

20 Overruled.

21 **THE WITNESS:** I'm not sure I used those words. I

22 want to just be referred to what I said.

23 **BY MS. DUNN:**

24 **Q.** I'm happy to point you to your deposition where you did
25 say that.

1 **A.** Okay.

2 **Q.** If you will look at page 173.

3 **A.** Okay.

4 **Q.** Actually, I apologize, sir. It may be 172.

5 **A.** Okay. I'm here. Okay. I see what I said. I do see what
6 I said, yes.

7 **Q.** And you say that "Epic will not be supportive of games
8 that are offensive and sexual in orientation." Do you see
9 that?

10 **A.** Yes.

11 **Q.** And a little further down, you say "No porn and no hate."
12 Do you see that?

13 **A.** I do.

14 **Q.** And you also say that you are always going to hold out a
15 subjective option if a game is not one that Epic Games would
16 want on the platform.

17 **A.** Yes.

18 **Q.** Do you see that?

19 But when you're talking about subjectivity, you are
20 talking about human curation, people, not machines, correct?

21 **A.** Yes.

22 **Q.** Okay. So the Court has already heard that on April 22nd
23 of this year, Epic Games Store added the Itch.io app to its
24 store.

25 **A.** Yes.

1 Q. You're aware of that?

2 A. I am.

3 Q. And you're aware that Itch.io is a third-party app store?

4 A. I am.

5 Q. And the Court has also heard that Itch.io was added
6 without reviewing all the games. You're aware of that?

7 A. Yes.

8 Q. And are you aware, sir, that Itch.io includes so-called
9 adult games such as a game called *Sisterly Lust*? Are you
10 aware of that?

11 A. I am not.

12 Q. And you may not be aware, then, that the description of
13 that game includes a list of fetishes which include many words
14 that are not appropriate for us to speak in federal court.

15 A. Okay.

16 Q. Are you aware that?

17 A. I am not.

18 Q. And the list goes on. There are many games on Itch.io. I
19 won't even read the names out loud.

20 A. Okay.

21 Q. But they are both offensive and sexualized. You're not
22 aware of that?

23 A. Itch.io is an app store that is not the Epic Games Store.
24 We are not distributing -- Itch is distributing Itch.io's
25 games. Epic is only distributing the app store Itch.io.

1 **Q.** And Itch.io is now available as an app on the Epic Games
2 Store; correct?

3 **A.** Correct.

4 **Q.** And those apps in Itch.io have not gone through any review
5 process whatsoever; correct?

6 **A.** They are subject to whatever process Itch.io puts in front
7 of their developers.

8 **Q.** Right. So Epic Games, your store, is on the hook for
9 whatever process Itch.io put in place to review these games
10 that are so offensive we cannot speak about them here;
11 correct?

12 **A.** I disagree with that statement.

13 **THE COURT:** Okay. So can you or can you not access
14 those apps through your app store?

15 **THE WITNESS:** You cannot access those apps through
16 the Epic Games Store, no. You can access those apps through
17 their application which that is what we are -- we are
18 downloading Itch.io, which is an app store. You have to have
19 your own account with you them and you use their store and you
20 are subject to their end user agreement.

21 **THE COURT:** So if I have a phone and your app store
22 was on that phone, you would -- that other store could be
23 downloaded which has all of this offensive material?

24 **THE WITNESS:** Not on your phone. It could be -- the
25 app could be downloaded onto your PC and you could access

1 their app on your PC.

2 **THE COURT:** But that's what you want to do on the
3 phone, too. That's what I understand?

4 **THE WITNESS:** I don't know that we would want to do
5 that with Itch.io, but we would want to provide app
6 distribution on -- on a mobile device, yes.

7 **THE COURT:** Okay. But you're doing it now, so I
8 could access it on my PC; right?

9 **THE WITNESS:** Yes.

10 **THE COURT:** And this lawsuit is about the ability to
11 do it on the phone; right?

12 **THE WITNESS:** My understanding, yes.

13 **THE COURT:** Okay. Go ahead.

14 **BY MS. DUNN:**

15 **Q.** And just so we're clear, sir, you can go to Epic Games
16 Store, click Itch.io, and download the offensive games. Are
17 you aware of that?

18 **A.** You can go to the Epic Games Store launcher if you
19 required Itch.io, and you can launch Itch.io's application,
20 which will take you out of the Epic Games Store and into their
21 application. You are then subject to their end user
22 agreement, and you are in the Itch.io ecosystem.

23 **Q.** You said to the Court just a second ago that you wouldn't
24 what to do that with Itch.io, meaning you wouldn't want to put
25 Itch.io on the phone?

1 **A.** I don't know that we would or wouldn't. I don't even know
2 that it's available as a mobile application.

3 **Q.** But the reason you said that to the Court is because
4 you're recognizing that this is offensive and sexualized
5 conduct that can be accessed?

6 **A.** I disagree with that statement.

7 **Q.** Okay. All right.

8 Let's change topics a little bit. Epic Games Store very
9 rarely provides paid marketing support to its developers;
10 that's correct?

11 **A.** These days, yes.

12 **Q.** Right. And the reason that you don't provide marketing
13 support to your developers is because it's difficult to recoup
14 such investments on a 12 percent commission; correct?

15 **A.** We may have said that, yes. It's true.

16 **Q.** Sir, is that your testimony?

17 **A.** Yes.

18 **Q.** All right. And because those external marketing costs
19 will never be recouped, you personally prefer to avoid them;
20 correct?

21 **A.** Yes.

22 **Q.** All right. And in order to induce developers to enter
23 into the exclusivity agreements that we talked about, Epic
24 Games Store offers them minimum guarantees; is that correct?

25 **A.** I disagree with the word "induce," but to have an

1 exclusivity partnership with the Epic Games Store, we offer
2 them a minimum guarantee, yes.

3 **Q.** The minimum guarantees were the lead component of the
4 strategy around content acquisition for the Epic Games Store;
5 correct?

6 **A.** For third-party content, yes.

7 **Q.** If you'll turn in your binder, sir, to Defense Exhibit
8 3993.

9 **A.** Okay. I have it.

10 **Q.** And do you recognize this document, sir?

11 **A.** I do.

12 **Q.** It's a presentation to the Epic Board of Directors from
13 January 16 of 2020.

14 **A.** I do.

15 **MS. DUNN:** Your Honor, we move to admit.

16 **THE COURT:** No objections?

17 **MR. CLARKE:** No objection, Your Honor.

18 **THE COURT:** Admitted.

19 (Defense Exhibit 3993 received in evidence)

20 **BY MS. DUNN:**

21 **Q.** Sir, will you turn in your binder to page 4 of this
22 document?

23 **A.** Yes.

24 **Q.** This presentation is to the Board of Directors at Epic.
25 This slide shows that by January of 2020, Epic Games Store had

1 1.1 billion in cumulative minimum guarantees outstanding;
2 correct?

3 **A.** That's correct.

4 **Q.** All right. And it also reflects that Epic expected to
5 lose 330 to 440 million in unrecouped minimum guarantees; is
6 that right?

7 **A.** We expect to invest 330 to 440 million in partnership
8 deals, yes.

9 **Q.** Okay. But --

10 **A.** We don't use the word "lose." We use the word
11 "investment" because we're investing in content that you can't
12 get anywhere else.

13 **Q.** Right. But you're not going to recoup the 330 to 440
14 million, which is why it says "unrecouped" on the slide;
15 correct?

16 **A.** This is only --

17 **Q.** Sir --

18 **A.** We expect to recoup that money over time.

19 **Q.** Okay. So when it says "unrecouped," that's incorrect?

20 **A.** Yeah.

21 **Q.** Okay. All right.

22 Sir, I think there should be in your binder an Exhibit
23 3795.

24 **A.** Okay.

25 **Q.** This is a presentation from February of 2020. Please let

1 me know if you recognize this.

2 **A.** I have never seen this.

3 **Q.** All right. Aside from the minimum guarantee deals that
4 Epic has, you also talked about a third-party publishing
5 business called Epic Games Publishing?

6 **A.** Yes.

7 **MS. DUNN:** And, Mr. Spalding, you can take this
8 exhibit down.

9 **Q.** Under this model, Epic pays a hundred percent of the
10 development costs and then recoups those costs and splits the
11 profits 50/50 with developers; correct?

12 **A.** Right. Yes.

13 **Q.** And you think that that 50/50 revenue split model is in
14 favor of the developer?

15 **A.** Yes.

16 **MR. CLARKE:** Your Honor, I apologize. There are
17 three exhibits that are subject to a motion to seal, and I
18 just want to get them on the record before they have go up on
19 the box, if that's okay. I apologize for interruption.

20 **THE COURT:** Okay.

21 **MR. CLARKE:** PX2469 --

22 **THE COURT:** Well, we haven't dealt with that yet;
23 right?

24 **MR. CLARKE:** That was shown during the direct
25 examination.

1 **THE COURT:** I didn't admit 2469, did I? I don't see
2 it on my list.

3 Yes, I did.

4 Okay. So that one we will hold.

5 **MR. CLARKE:** That's correct.

6 **THE COURT:** What else?

7 **MR. CLARKE:** 5536.

8 **THE COURT:** Okay. Hold.

9 **MR. CLARKE:** And 3993.

10 **THE COURT:** Okay.

11 Proceed, Ms. Dunn.

12 **MR. CLARKE:** 3399. I apologize.

13 **THE COURT:** Okay. 3993 or 3399?

14 **MR. CLARKE:** My understanding is both.

15 And I apologize for interrupting the examination.

16 **THE COURT:** Ms. Dunn.

17 **MS. DUNN:** Thank you, Your Honor.

18 **Q.** So this is a presentation from June of 2020; correct?

19 **A.** Where are we?

20 **Q.** We are in -- I'll tell you in one second -- PX2469. This
21 was the exhibit that your counsel launched with you.

22 If you will turn to page 8. All right. So the top of
23 this slide says "EGF plus EGP five-year P&L model, prior vs.
24 current plan."

25 **A.** Yep.

1 **Q.** And the projections on the left are projections as of the
2 fall of 2019. Do you see that?

3 **A.** That's right.

4 **Q.** All right. And at that time, the P&L view reflected only
5 the Epic Games Store; is that correct?

6 **A.** Yep.

7 **Q.** And then on the right side by June of 20, Epic had decided
8 to combine the Epic Games Store and Epic Games Publishing in
9 the P&L view. Do you see --

10 **A.** I would say our FP&A team created a view that combines
11 those two. It Epic didn't decide to communicate to form our
12 P&Ls in this way. Our FP&A team put this together to
13 illustrate a point.

14 **Q.** Okay. But you don't disagree that the left is just the
15 Epic Games Store as of the fall of 2019; correct?

16 **A.** Yes. About a year and a half ago, correct.

17 **Q.** And then slide 9 is the next slide, and that just says
18 "graveyard" on it, so those are slides that were not used;
19 correct?

20 **A.** Yes.

21 **Q.** And if you look at slide 10, slide 10 is the calculations
22 for Epic Games Store only in June of 2020, not including
23 publishing; correct?

24 **A.** This is a graveyard slide so I'm not sure if it's here and
25 complete or here and incomplete. I can't really -- this is a

1 EGS only slide for sure.

2 **Q.** Right. And in this deck in June of 2020, you don't
3 disagree with that?

4 **A.** I agree it's in the graveyard in June of 2020, yes.
5 "Graveyard" means not to be used.

6 **Q.** I'm going to now ask Mr. Spalding to compare on the screen
7 for you the 2019 projections for the Epic Games Store only
8 with the 2020 projections for gross revenue for the Epic Games
9 Store. And when he does that, you can see that the 2020
10 figures are much lower than the 2019 figures. Can you see
11 that?

12 **A.** I'm getting lost in what point you're trying to make.

13 I see that they're different. They are also from
14 different times. Our -- our financial conversations are
15 always evolving based on what is actually happening in
16 realtime so we update our plans constantly, up or down.

17 **Q.** You don't disagree, sir, that what this reflects is the
18 projected total gross revenue in 2019 -- strike that.

19 You don't disagree that in 2019, the projected total gross
20 revenue for 2024 was 1.1 billion, but in 2020, this shows
21 projected total gross revenue for 2024 as 836 million. Do you
22 see that?

23 **A.** I see that they're different. I don't have all the
24 context. I believe they are different views at different
25 times based on different information and where we were having

1 different scenarios. We are constantly updating our plans
2 based on what's happening.

3 **Q.** Right. And all I'm asking you, sir, looking at this, the
4 two slides that were in this deck --

5 **A.** They are different, yes.

6 **Q.** Right. And they're not just a little bit different.
7 They're quite a lot different because the difference for 2024
8 projected total gross revenue has decreased by 341 million,
9 which is roughly a 30-percent decline. Can you see that?

10 **A.** I see that in these two comparisons that you are talking
11 me through, yes.

12 **Q.** All right. If you will turn in your binder to Defense
13 Exhibit 3681. These are messages from the Slack messaging
14 platform. Do you recognize the platform?

15 **A.** I'm not finding 3681.

16 **THE COURT:** So it's light in color. It says
17 "redacted" on my version.

18 **THE WITNESS:** Okay. Thank you. Okay.

19 **BY MS. DUNN:**

20 **Q.** All right. So do you have DX3681 in front of you?

21 **A.** I do.

22 **Q.** All right. This is a printout of Slack messages, and the
23 employees within Epic games sometimes use the Slack messaging
24 platform to communicate with each other; is that right?

25 **A.** Yes.

1 **Q.** And these particular messages are dated August 6th and 7th
2 of 2020?

3 **A.** Yes.

4 **Q.** And you were part of this Slack channel, you were part of
5 these messages?

6 **A.** I guess so, yes. I see it.

7 **Q.** Okay. If you look at page 4, you will see your name,
8 Steven Allison?

9 **A.** I do.

10 **MS. DANSEY:** Your Honor, we move to admit DX3681.

11 **THE COURT:** Any objection?

12 **MR. CLARKE:** No objection.

13 **THE COURT:** Admitted.

14 (Defense Exhibit 3681 received in evidence)

15 **BY MS. DUNN:**

16 **Q.** All right. So, sir, if you look at this document, you
17 will see that these are Slack messages discussing Project
18 Liberty and the Mega Drop. Do you see that?

19 **A.** I do.

20 **Q.** And you know what Project Liberty is; correct?

21 **A.** I do.

22 **Q.** And the Mega Drop was a permanent 20 percent reduction in
23 price for *Fortnite* on other platforms other than iOS and
24 Android; correct?

25 **A.** That's my understanding.

1 Q. All right. And that price reduction in *Fortnite* was set
2 to occur on the same day as the hotfix would be activated on
3 iOS and Android *Fortnite* apps; that's correct?

4 A. I don't know that detail.

5 Q. But you're aware, sir, that the activation of the hotfix
6 took place on August 13th of 2020?

7 A. I'm aware it's that general time frame.

8 Q. All right. And if you look at the last entry on page 4.

9 A. Yes.

10 Q. This is something that you said, steven Allison. There is
11 your name. You see that?

12 A. I do.

13 Q. And you say, "GTA caused EGS to fall over," and GTA is an
14 acronym for Grand Theft Auto; correct?

15 A. That's correct.

16 Q. And later in this post, you say it was -- "That the
17 traffic pointed at EGS web and launcher was so much larger
18 than we even expected. We had issues for about eight hours
19 getting that are sorted out rescaling there."

20 A. That's right.

21 Q. Do you see that?

22 A. Yes.

23 Q. What is being discussed here, sir, is the possibility of
24 Epic Games Store being overwhelmed on August 13th of 2020;
25 correct?

1 **A.** If I can recall, which I do slightly, this is the team
2 checking in to see that if we get a high volume of traffic,
3 that the store will not fall over and be confirming that it
4 will not.

5 **Q.** Right. But specifically when the hotfix was activated and
6 the Mega Drop occurred on August 13th of 2020; correct?

7 **A.** I think so.

8 **Q.** Well, if you direct your attention to page 5, you're next
9 message expressly mentions August 13th. Let me know if that
10 helps refresh your recollection.

11 **A.** I do. I was referencing games we were giving away free.

12 **Q.** Right. And you wanted to make sure that the Epic Games
13 Store, which had had previous problems sustaining a high level
14 of traffic, did not fall over?

15 **A.** The Epic Games Store had -- has had one or two examples of
16 not sustaining historic levels of traffic, to be fair.

17 **Q.** And you were expecting on August 13, 2020, historic levels
18 of traffic; correct?

19 **A.** We were giving Total War away free, and we expected high
20 traffic.

21 **Q.** All right. So you were involved in this Slack chat. Were
22 you also involved in the all-day Project Liberty Slack channel
23 that took place on August 13th?

24 **A.** I don't -- I don't know that I was. I can't remember.

25 **Q.** Okay. Were you involved in the all-day Zoom session that

1 took place that day?

2 **A.** No.

3 **Q.** Are you aware that there was a run of show that set forth
4 step by step everything that would happen on August 13th?

5 **A.** No.

6 **Q.** All right.

7 Mr. Allison, it would not be accurate, in your opinion, to
8 characterize Epic's 12 percent commission as just a payment
9 processing fee; right?

10 **A.** No.

11 **Q.** No, it wouldn't?

12 **A.** No, it would not.

13 **Q.** It would not be accurate to characterize it that way?

14 **A.** That it's a payment processing fee?

15 **Q.** Yes.

16 **A.** No.

17 **Q.** I'm just trying to avoid a double negative. All right.

18 Because people are paying Epic to be on the platform;
19 right?

20 **A.** Yes.

21 **Q.** Right. And Epic does not view Epic Game Store's
22 commission as a payment processing fee but, rather, a payment
23 for access to your audience; isn't that correct?

24 **A.** It's -- yes. It's a way to say it, yes.

25 **Q.** And comparing Epic's commission to a payment processing

1 fee charged by, for example, credit cards would be apples to
2 oranges because a developer can't present a game to 60 million
3 users with a payment processor; correct?

4 **A.** That's correct.

5 **Q.** Okay. Now, prior to December 2019, Epic Game Store
6 required developers to use the Epic payment mechanism for all
7 game purchases and in-game purchases. I believe you said that
8 on direct examination?

9 **A.** That's correct.

10 **Q.** All right. But in December of 2019, Epic changed its
11 policy to allow third-party developers on Epic Games Store to
12 use payment mechanisms other than Epic's own for in-game
13 purchases; correct?

14 **A.** Yes.

15 **Q.** Was Mr. Sweeney involved in that decision?

16 **A.** Yes.

17 **Q.** Okay. Your testimony on -- when the Court asked you about
18 this is that this had nothing to do with Project Liberty?

19 **A.** Not from my perspective, no.

20 **Q.** Would your view change if you knew that Mr. Sweeney
21 testified that the idea for Project Liberty developed
22 throughout 2019?

23 **A.** I didn't participate in any of that ideation so I'm
24 unaware of when or how it was formulated.

25 **Q.** Okay. But if you knew that it was formulated in December

1 of 2019, would it change your testimony today?

2 **A.** No. I would be happy to clarify --

3 **Q.** That's okay. Your counsel can ask you.

4 **A.** Sure.

5 **Q.** You're aware, sir, that developers are still required to
6 use Epic's payment mechanism for buying a game as opposed to
7 in-game purchases; correct?

8 **A.** Yes.

9 **Q.** All right.

10 **THE COURT:** When did you become involved in Project
11 Liberty?

12 **THE WITNESS:** Two -- this slide would be the first
13 time I had wind of it when they were checking on volume and
14 then I was read in more depth in, I think, the 11th of August.

15 **THE COURT:** August 2020?

16 **THE WITNESS:** Yes.

17 **BY MS. DUNN:**

18 **Q.** Well, Mr. Allison, when you found out about Project
19 Liberty, did you say to Mr. Sweeney that perhaps Epic should
20 not be deceiving Apple?

21 **A.** I said nothing to Mr. Sweeney about Project Liberty.

22 **Q.** All right.

23 I pass the witness.

24 **THE COURT:** Cross -- not cross. Redirect?

25 **MR. CLARKE:** Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. CLARKE:

Q. Mr. Allison, could I ask you to start by turning to Exhibit DX5536 in the binder that counsel for Apple handed you.

A. Which number again? I'm sorry.

Q. 5536.

A. 5536. Yes.

Q. Can you -- what is this document that you're looking at?

A. This is the *Fortnite* beginners guide.

Q. Do you have any responsibilities for *Fortnite* at Epic?

A. I do not.

Q. Do you have any sort of marketing responsibilities for first-party content?

A. As a platform, we engage with the *Fortnite* team and the -- our first-party team like they are any other developer. So we market on their behalf working with their publishing team.

Q. Did you review this document before it was -- before it was published?

A. I have never seen it before.

Q. Mr. Allison, you were asked a few questions about the 88/12 revenue split. Do you recall that?

A. Yes.

Q. There was a question as to whether it was outside industry standard. Do you recall that?

1 **A.** I do.

2 **Q.** Could I ask you to open up your deposition transcript,
3 page 53.

4 **A.** Sure. I'm here.

5 **Q.** You see the testimony that counsel directed you to?

6 **A.** Yes.

7 **Q.** Do you recall what time period you were referring to in
8 that testimony?

9 **A.** I don't.

10 **Q.** Well, I might be able -- if you would take a look back at
11 page 50.

12 **A.** Okay.

13 **Q.** Towards the top of page 50, there is a reference to the
14 document that you were looking at at the time. Does this
15 refresh your recollection as to what time period you were
16 referring to there?

17 **A.** Yes.

18 **Q.** Okay. And what time period was that?

19 **A.** It looks like July of 2019.

20 **Q.** And have there been any changes in industry commission
21 structure since that time?

22 **A.** There has.

23 **Q.** What are those changes?

24 **A.** Microsoft has switched to an 88/12 share on the Windows 10
25 Store. There have been numerous self-published games that

1 give different rev share, 95/5. Itch.io offers a
2 pay-what-you-want structure, but the big change is that
3 Microsoft shifted their relative structure. Steam did it
4 before we released in December of 2020. I also understand
5 that some royalties have changed on mobile.

6 **Q.** Mr. Allison, if you could take a look at the Exhibit
7 DX4638 in the binder that counsel handed you.

8 **A.** Yes.

9 **Q.** Can you explain to the Court what was going on in this
10 discussion?

11 **A.** We had a developer who we are very fond of, think highly
12 of, and are close with, they were very proud of their
13 partnership with the Epic Games Store and did a blog post with
14 sarcasm about the conversations that were happening around the
15 Epic Games Store -- there was issues like we don't have enough
16 features or exclusive or anticonsumer -- as a way of trying to
17 diffuse a conversation in the community that this developer
18 thought was silly, for lack of a better term, and it backfired
19 on him.

20 **THE COURT:** So the developer disagreed that it was
21 silly?

22 **THE WITNESS:** No. The developer here agreed --

23 **THE COURT:** No. But when you say it backfired, it's
24 because there was backlash for his perspective?

25 **THE WITNESS:** There was backlash from the trolling

1 community from sort of stoking this conversation anew, and it
2 just brought out every sort of -- they're called trolls,
3 people who go on to forums and say terrible things about all
4 sorts of topics, but it brought out the trolls on the Epic
5 Games Store, yes.

6 **BY MR. CLARKE:**

7 **Q.** Mr. Allison, could you turn to page -- to Exhibit PX2469,
8 please.

9 **A.** Yes.

10 **Q.** Could you turn to PX2469.8.

11 **A.** Yes.

12 **Q.** Was this a page that counsel for Apple directed you to?

13 **A.** I believe so, yes.

14 **Q.** Could you turn to PX2469.10.

15 **A.** Yes.

16 **Q.** Was this another page that counsel for Apple directed you
17 to?

18 **A.** Yes.

19 **Q.** And she asked you to compare projections on those two
20 pages; is that right?

21 **A.** I believe so.

22 **Q.** Okay. Do you have any understanding for whether the slide
23 on page 10 is a final analysis?

24 **A.** It is not. Anything that goes into a graveyard is a slide
25 that is dead. It is either not complete, it might not be

1 accurate, it might not -- it's just not for use.

2 **Q.** Are there any revenue sources that are reflected on slide
3 8 that are not reflected on slide 10?

4 **A.** Yes.

5 **Q.** What are those?

6 **A.** The Epic Games Publishing revenue is in the table to the
7 right on slide 8 and is not part of slide 10.

8 **Q.** Could you take a look at DX3681, please.

9 **A.** Yes.

10 **Q.** In your answer, you referenced something about a game
11 sale; is that correct?

12 **A.** Let me find it. What page?

13 **Q.** So your Slack message in this chain that you were directed
14 to was -- I apologize.

15 **A.** We had a game launch on 8/13.

16 **Q.** So on page DX3681.005 towards the top of the page --

17 **A.** Yes.

18 **Q.** -- you wrote a message that said "Plus we are also giving
19 remnant from the ashes." Do you see that?

20 **A.** Yes.

21 **Q.** I believe in your answer to Apple's counsel, you
22 referenced a free game promotion at that point?

23 **A.** Yes.

24 **Q.** Could you explain what that was?

25 **A.** Yeah. We had a partnership with Sega on *Total War Troy*, a

1 historical strategy simulation, to give away *Total War Troy*,
2 their brand new game, free for 24 hours, plus we were also
3 giving away a game called *Remnant: From the Ashes* free, so it
4 was going to be a big-volume-day for the Epic Games Store free
5 games.

6 **Q.** And do you have an understanding for what the discussion
7 was that was taking place in this Slack chain?

8 **A.** At this time, I had very little context, but I understand
9 that they were concerned that there was going to be a very
10 high volume day on the *Fortnite* side.

11 **THE COURT:** So on 8/6 you did or not know that 8/13
12 was the Project Liberty launch?

13 **THE WITNESS:** I got pulled into this -- when you get
14 pulled into Slack, you kind of get pulled in out of context.
15 I got pulled in to talk about -- I didn't know what was going
16 on exactly, no.

17 **THE COURT:** Okay. All you knew is that there was
18 something happening and you didn't know what?

19 **THE WITNESS:** That's correct.

20 **BY MR. CLARKE:**

21 **Q.** Mr. Allison, you were shown the Epic Games Store web page;
22 is that correct?

23 **A.** Yes.

24 **Q.** And I believe you testified earlier that there were
25 certain non-game apps that appeared on the Epic Games Store;

1 is that correct?

2 **A.** Yes.

3 **Q.** Where would I find those apps on the Epic Games Store web
4 page?

5 **A.** Right now, because -- they're correct, we added several on
6 4/22, we need to implement new tags for apps, and Spotify
7 would show up under Spotify.

8 **Q.** So is there a particular section of the --

9 **A.** There -- yes. There is an app -- there is what we call a
10 landing page for apps within the Epic Games Store. We could
11 look at it. But there was a dedicated area for apps on the
12 Epic Games Store, you're correct.

13 **MR. CLARKE:** Thank you.

14 No further questions.

15 **THE COURT:** Any recross limited to the scope of
16 redirect?

17 **MS. DUNN:** Very briefly, Your Honor.

18 **RECROSS-EXAMINATION**

19 **BY MS. DUNN:**

20 **Q.** I believe your counsel just asked you about the apps that
21 had been added recently. So now that you know that there's
22 this offensive and sexual conduct or -- I'm sorry.

23 Now that you know that there are offensive and sexualized
24 apps on Itch.io, as the head of the Epic Games Store, do you
25 plan to do anything about that?

1 **MR. CLARKE:** Objection, Your Honor. Outside the
2 scope of redirect.

3 **THE COURT:** Overruled.

4 **THE WITNESS:** I don't have an answer for you. I will
5 go dig in when we get back, but I don't have an answer for
6 you. I'm not sure. These apps are Itch.io's apps not the
7 Epic Games Store apps.

8 **BY MS. DUNN:**

9 **Q.** Right. So Epic has been advertising putting these apps in
10 the store. Mr. Sweeney put up a Tweet about Itch.io, and now
11 you seem to be distancing yourself from Itch.io because you
12 realized that there are apps in there that you have not
13 reviewed and cannot stand behind.

14 **A.** I disagree with what you're saying. Itch.io is an
15 incredible community for developers that we support fully.
16 They have an open platform and therefore have different
17 moderation standards than the Epic Games Store.

18 **Q.** I just want to know, sir, if you support fully the
19 offensive and sexualized content that is available there when
20 people go to the Epic Games Store and download Itch.io?

21 **A.** I -- I can't answer that question. I don't support
22 sexualized content of any sort.

23 **Q.** All right.

24 Sir, please turn in your binder to DX3955.

25 **A.** Okay.

1 **Q.** This is an Epic Games Store presentation to the Epic Board
2 of Directors.

3 **A.** Yes. In 2019.

4 **MS. DUNN:** Your Honor, we move to admit, if we
5 haven't done that already.

6 **THE COURT:** Okay. No objections?

7 **MR. CLARKE:** Your Honor, I note that this is subject
8 to a motion to seal and this is outside the scope of redirect,
9 but otherwise, no objections to the admission of the exhibit.

10 **THE COURT:** He is still on the stand, and I still
11 have questions. It's admitted subject to sealing.

12 (Defense Exhibit 3955 received in evidence)

13 **MS. DUNN:** Thank you, Your Honor.

14 **Q.** Sir, please turn to page 3.

15 Mr. Spalding, if you could put that on the screen.

16 **THE COURT:** Is this within the scope of redirect?

17 **MS. DUNN:** Yes, Your Honor.

18 **THE WITNESS:** Okay. I'm here.

19 **MS. DUNN:** I'm sorry. Are you having technical
20 difficulties?

21 **THE COURT:** Can you switch it over, Frances? Thank
22 you.

23 **MS. DUNN:** Thank you.

24 **MR. CLARKE:** Your Honor, because this exhibit is
25 subject to a motion to seal, I might ask that it not be shown

1 on the screen.

2 **MS. DUNN:** Your Honor, I do not plan to show anything
3 subject to a motion.

4 **MR. CLARKE:** Okay.

5 **THE WITNESS:** I'm here.

6 **BY MS. DUNN:**

7 **Q.** Sir, will you please look at the top of this document. It
8 says, "Epic Games Store strategy." And the first bullet in
9 this board deck says, "Provide developers with better
10 economics, 88/12 of revenue share vs. 70/30 industry
11 standard." Do you see that?

12 **A.** Yes.

13 **Q.** That was in the strategy document presented to the Epic
14 board as of August 13 of 2019. Do you see that?

15 **A.** I do.

16 **Q.** And these were also similar words that you used in your
17 own deposition several months ago. Do you remember that?

18 **A.** I do.

19 **Q.** Okay. And yet somehow it's your testimony today that this
20 is no longer in the past three months industry standard; is
21 that correct?

22 **A.** Things have changed --

23 **Q.** Sir, my question is is that your testimony?

24 **A.** Yes, that is my testimony.

25 **MS. DUNN:** Thank you. No further questions.

1 **THE COURT:** Okay. Any questions with respect to
2 those two topics?

3 **MR. CLARKE:** Just one, Your Honor.

4 **THE COURT:** Again, don't promise. Don't say "one."
5 See, I'm being nice. There are some judges who will say "sit
6 down."

7 **MR. CLARKE:** Thank you, Your Honor.

8 **FURTHER REDIRECT EXAMINATION**

9 **BY MR. CLARKE:**

10 **Q.** Mr. Allison, can you take a look at DX3955.

11 **A.** Yes.

12 **Q.** What's the date on this document?

13 **A.** August of 2019. August 13, 2019.

14 **Q.** How long after the Epic Games Store launched was this
15 document created?

16 **A.** Eight and a half months.

17 **Q.** Have there been any changes in industry commissions since
18 this document was created?

19 **A.** Yes.

20 **Q.** Thank you.

21 No further questions.

22 **THE COURT:** Who is in the industry, Mr. Allison?

23 **THE WITNESS:** Well, broadly anyone who creates games
24 and apps and publishes games and apps, but the industry
25 standard here at this point in time was referring to the game

1 stores. I'll clarify that.

2 **THE COURT:** Because you identified two changes. So
3 two changes in the entirety industry changes the industry?

4 **THE WITNESS:** Well, Steam has a 70 to 85 percent
5 market share and has changed their rev share. We talked about
6 that, too, structure. The Windows 10 Store is arguably the
7 third biggest after us. Apple and Google, I believe, also
8 changed their rev share for the first million dollars of
9 revenue sold on their platforms since this time, so I think
10 those are the big players, yes.

11 **THE COURT:** Okay. Did you ever ask anyone who you
12 considered to be more senior than you why you were not advised
13 of Project Liberty?

14 **THE WITNESS:** I have not.

15 **THE COURT:** Okay. Anything on that -- on those
16 questions?

17 **MR. CLARKE:** Nothing here, Your Honor.

18 **MS. DUNN:** No, Your Honor.

19 **THE COURT:** All right, sir. You may step down.

20 Next witness.

21 **MS. MOSKOWITZ:** , Your Honor, Epic calls Matthew
22 Weissinger.

23 **MATTHEW WEISSINGER,**

24 called as a witness for the Plaintiff, having been duly sworn,
25 testified as follows:

1 **THE CLERK:** Please be seated. And then would you
2 please state your full name and spell your last name.

3 **THE WITNESS:** Sure. It's Matthew Reid Weissinger.
4 Last name W-E-I-S-S-I-N-G-E-R.

5 **THE COURT:** Good afternoon, sir.

6 **THE WITNESS:** Good afternoon.

7 **THE COURT:** You may proceed.

8 **MS. MOSKOWITZ:** Thank you, Your Honor.

9 **DIRECT EXAMINATION**

10 **BY MS. MOSKOWITZ:**

11 **Q.** Good morning -- good afternoon, Mr. Weissinger.

12 **THE COURT:** Say "good end of week."

13 **MS. MOSKOWITZ:** Also without coffee.

14 **Q.** Where are you employed?

15 **A.** Epic Games.

16 **Q.** When did you join Epic Games?

17 **A.** In May of 2016.

18 **Q.** What was your title and role when you joined?

19 **A.** I was director of marketing focused on games business.

20 **Q.** And did your title and role change at some point?

21 **A.** Yes. Over the years, I took on additional
22 responsibilities. I was promoted to head of marketing. Some
23 of the additional responsibilities I took on on the way were
24 product management, analytics, user acquisition, the user
25 experience, the player support, PR, community, among others.

1 And then a couple years later, I was promoted to
2 vice-president of marketing, and in that role, I also oversaw
3 Houseparty social efforts as well as international publishing.

4 **Q.** And in your marketing capacity, do you interact with any
5 other aspects of Epic's business?

6 **A.** Yes. I also frequently work with our Epic Games Store,
7 our Epic Games Publishing teams and *Unreal Engine* teams as
8 well.

9 **Q.** By now it I think it is fair to say we have heard a bit of
10 *Fortnite*. Just, if you could, briefly or generally describe
11 what *Fortnite* is and how users go about experiencing it.

12 **A.** Sure. Very briefly, when people think of *Fortnite*, they
13 generally think of three modes. It is the Battle Royale Mode.
14 It's the classic 99 players and one wins and -- but in
15 addition to that, there is other modes of play as well,
16 including Creative Mode and Party Royale Mode.

17 **Q.** What's Creative Mode?

18 **A.** Creative Mode is basically a separate area of the game
19 where a player can create their own unique social hub
20 experience. In that mode, they can create all sorts of
21 different play types. That would include things like a
22 virtual tourism exhibit. It could be things that are just
23 social experiences such as a fashion show. They could do
24 something like compose music inside of this. So it actually
25 represents a whole diverse set of additional play modes that

1 they can create using some user tools.

2 **MS. MOSKOWITZ:** We have a demonstrative video that
3 has been prepared for our Creative Mode. I believe there is
4 no objection, but I wanted to confirm before we publish it?

5 **MR. DOREN:** No objection, Your Honor.

6 **MS. MOSKOWITZ:** Thank you.

7 Mr. Rudd, would you cue up and play PDX0067.

8 (Whereupon, the video was played)

9 **BY MS. MOSKOWITZ:**

10 **Q.** And, Mr. Weissinger, was that a demonstration of Creative
11 Mode?

12 **A.** Yes.

13 **Q.** You also mentioned Party Royale. Can you explain what
14 that mode is all about?

15 **A.** Sure. Coming off of some of the success that we were
16 seeing in our Creative Mode, we really said people were using
17 *Fortnite* in ways even that we hadn't necessarily expected in
18 the beginning, and they were using them as basically a social
19 place to get together and experience different events and
20 activities inside of the game.

21 So we actually created an entirely separate mode called
22 Party Royale where we could, at a faster pace and cadence,
23 create more events and experiences for people to take part in
24 inside of that mode.

25 **Q.** What kind of events or experiences are being hosted within

1 Party Royale?

2 **A.** There's a ton of different content. Some of the main ones
3 include people can get together and watch linear content, like
4 television or movies. People can get together and watch music
5 experience, like a concert or something like that. And then
6 we also have separately used the platform to talk about
7 various social justice issues.

8 **Q.** So let's walk through those a bit in more detail. You
9 mentioned linear content like movies. Can you describe the
10 movie events?

11 **A.** Sure. For movies, we actually have done both kind of a
12 short film festival recently and then also we also partnered
13 with like the major studios so, for example, with Warner Bros.
14 for the upcoming release of the movie *Tenet*, we partnered with
15 them to actually host an interview with John David Washington,
16 who is the lead actor in the movie. We had this interview,
17 and then he actually went and queued up a promotional trailer
18 for the movie. That was kind of a world premiere, world
19 exclusive.

20 And then after that, we actually had a celebration of
21 Christopher Nolan films. Christopher Nolan was the director
22 of *Tenet*, so we separately hosted three different movies
23 inside Party Royale including, I think it was, *Tenet*, *Dark*
24 *Knight*, and the *Prestige* -- I'm sorry. I said *Tenet*. It was
25 *Dark Knight*, *Prestige*, and -- oh, dear -- *Inception*. It got

1 stuck in my brain just then.

2 **Q.** And you also mentioned TV shows as part of that linear
3 content that is occurring within Party Royale. Can you speak
4 to some of those?

5 **A.** Sure. We partnered with a bunch of different groups. We
6 partnered with the ESPN, for example, to host some of their
7 ESPN -- *The Ocho Content*, and that's like this variety sports
8 fun content that we showed over a weekend and actually --

9 **THE COURT:** How do you spell that?

10 **THE WITNESS:** The Ocho Show. Like O-C-H-O. Like --

11 **THE COURT:** Oh, ocho, like eight.

12 **THE WITNESS:** It stands for eight.

13 **THE COURT:** Okay. Sorry.

14 **THE WITNESS:** No worries.

15 **THE COURT:** Go ahead.

16 **THE WITNESS:** And over two million people actually
17 tuned in to watch that content.

18 And then separately we -- another example is we partnered
19 with Discovery Channel for their Shark Week content. It's a
20 big annual event for them, and they have a new series called
21 *Tiger Shark King* so we partnered with them to premiere an
22 episode inside Party Royale, and over 900,000 people actually
23 ended up watching that.

24 **BY MS. MOSKOWITZ:**

25 **Q.** You also mentioned linear content, or perhaps is there

1 other types of linear content that gets hosted or viewed
2 within Party Royale?

3 **A.** Yeah. I mean, separately we know we have a big platform
4 with *Fortnite* and even outside of *Fortnite*. There is a lot of
5 important things happening in the world. And so in one
6 particular instance, we actually created a series to discuss
7 issues around social and racial injustice that's happening in
8 society and kind of fostered discussion on those fronts, and
9 there was a series called *We The People*, and it aired inside
10 Party Royale, and I believe one-and-a-half-million people
11 actually tuned in for that.

12 **THE COURT:** Why does it have to do it in Party
13 Royale? Like, why couldn't you -- why couldn't *Fortnite*
14 sponsor an app that says "We The People" and then everybody
15 can just use that app, and if it's just a discussion, it's all
16 free?

17 **THE WITNESS:** Because we have so many people already
18 going through *Fortnite* that we separately then have this
19 platform where we can deliver content and experiences outside
20 of the traditional Battle Royale Game Mode that people can
21 partake in. And what we are seeing in these creative modes
22 actually was that people were just joining to hang out and
23 socialize with each other, and they were gravitating towards
24 maps and experiences that had these kind of strange events or
25 just social mechanics to them.

1 And so Party Royale is a creation basically identifying
2 those player habits and saying wouldn't it be great if we had
3 a place that didn't have competition and didn't have goals and
4 didn't have challenges where people could just hang out and
5 experience awesome content together.

6 **THE COURT:** But I still don't understand. But Party
7 Royale is not its own app?

8 **THE WITNESS:** It's basically when you first start up
9 the game, there is a couple different options that you can
10 take. You can go into a Battle Royale match or you can go
11 into Party Royale.

12 **THE COURT:** But you funnel them through the same app;
13 right? You have one app, and then you funnel everything out
14 of that app. My question is why not just have four apps?

15 **THE WITNESS:** Because all of your social connections
16 exist within that one app, so my friends list and -- and all
17 the people I normally will hang out with are already there --

18 **THE COURT:** But what about cross-platforming? Why
19 couldn't you have four apps, and as long as you had an
20 account, everybody could -- all your friends would still be
21 there?

22 **THE WITNESS:** That's also just like a confusing
23 experience for the user. So imagine, it's like which of the
24 four apps do I boot up and how do I go and connect with you?
25 It's much easier to just hop into *Fortnite* and do this cool

1 thing, and it's -- we have got all sorts of messaging tools
2 inside the game to say when you're coming in, either check out
3 this awesome experience. There is a concert going on. It's,
4 like, cool. And there is 30 million people coming through the
5 game, and you can send a message to them and say, "Hey, this
6 is going on live right now," and then you tell your friends
7 who are in the game, it's like, "Let's go, let's check it
8 out," and everybody goes, and they have this awesome
9 experience together.

10 **THE COURT:** Proceed.

11 **BY MS. MOSKOWITZ:**

12 **Q.** You mentioned concerts just now. Can you tell the Court
13 about the concerts that have gone on within *Fortnite*?

14 **A.** Sure. You know, specifically there is a lot of different
15 concerts that we've done. The concerts specifically in Party
16 Royale, we've had a wide variety of them. We do regional
17 concerts, so we've done, you know, region-focused concerts
18 like Kenshi Yonezu was one. It was a J pop star, and that
19 actual concert resulted at the time in the highest daily
20 active users in Japan that we had ever had.

21 We've done -- we've premiered music videos with bands like
22 BTS, who is like this huge -- one of the biggest bands on the
23 planet. And we actually premiered a new music video for the
24 Dynamite Mode.

25 And most recently we did a DJ concert series with a DJ

1 called Kaskade. That was in March of this year, 2021. And it
2 was in celebration of our Rocket League title which is another
3 Epic Games title and kind of came together and had this fan
4 celebration around DJ Kaskade.

5 **Q.** Are there any other concerts of note that have occurred
6 within *Fortnite's* history?

7 **A.** Yes. Separately in our Battle Royale Mode, we had some
8 very major events. One with Marshmello and another with
9 Travis Scott.

10 **Q.** And do you recall how many users came to experience the
11 Travis Scott concert?

12 **A.** At its peak, I think we had 12.3 million concurrent
13 players live in the Travis Scott experience at the same time.
14 So it's like not just people who came through to one of the
15 five different shows. At its peak for the main show, the
16 first one, it actually reached 12.3 million people all logged
17 in at once at the same time.

18 **Q.** That happened when *Fortnite* was still on iOS; right?

19 **A.** That's correct.

20 **Q.** Do you recall how many of that 12.3 million concurrent
21 users were iOS users?

22 **A.** I believe it was 2 million.

23 **Q.** Do you have -- do we have a demonstrative video that shows
24 some examples of the content that has been made available on
25 Party Royale?

1 **A.** Yes.

2 **MS. MOSKOWITZ:** I am going to ask Mr. Rudd to cue up
3 and play PDX0065.

4 (Whereupon, the video was played.)

5 **BY MS. MOSKOWITZ:**

6 **Q.** Do you think about Creative Mode and Party Royale as
7 games?

8 **A.** It's probably one of the remarkable things about *Fortnite*,
9 is we are building the beginnings of what we think is a thing
10 called Metaverse, and it's this social place where people can
11 experience events together and hang out together, and probably
12 the best way -- one of the ways that I've tried to explain it
13 when people say, "Hey, what's going on in *Fortnite*," is think
14 about all of us in the situation that we're in right now and
15 kind of locked down and how we try to stay socially connected
16 to each other. And some of the most meaningful experiences
17 that I've had have been when we've kind of logged in to Zoom,
18 and we have our friends and our parents, and we all kind --
19 our family get together, and we celebrate grandpa's birthday.
20 We all sing together and then we turn on some filters. We
21 have this the great kind of shared moment together.

22 And we do it in other ways, too. We connect, and we will
23 all go in for a cooking class or a happy hour, or my kids and
24 I did a magician show. We come together in these ways where
25 even though we are hundreds or thousands of miles apart, we

1 come together and we shared experiences that are extremely
2 meaningful.

3 And so you look at *Fortnite*, and that's what people are
4 doing inside there. And I think people don't really
5 understand the scale of it. It's -- nearly half of the
6 players coming into our game on a daily basis are playing
7 Creative and Party Royale Modes and that's like 30 million
8 people every day coming in.

9 And so when people say, "Matt, why is *Fortnite* so special?
10 Why does it -- why did this game do that?" I don't know if a
11 game could. My answer is basically it's more than a game.
12 It's not just a game. There is a reason that this game did
13 that. It's because there is more to it.

14 **Q.** In Battle Royale Mode, which is the one I think you
15 described as a more traditional game, players against each
16 other, do you have to play a match in Battle Royale?

17 **A.** No. That was one of the other interesting insights that
18 came that we identified early when people are playing Battle
19 Royale was people were spotting up and playing together with
20 friends, but there were some people who just weren't playing
21 the game, and it was because they just wanted to hang out and
22 talk and -- but they didn't want to actually play the Battle
23 Royale Mode, so we actually created this whole separate
24 feature called "sit out" where at the end of a match, you
25 could click this button and say, "I just want to sit this one

1 out," and you could -- you don't then have to play. You're
2 just still hanging out with your friends, and you can cheer
3 them on in match, or you can just talk, but this is like a
4 direct feature mode that we created in response to these play
5 patterns that we were seeing.

6 **Q.** Have you heard of Roblox?

7 **A.** Yes.

8 **Q.** We were just talking about Battle Royale and *Fortnite*.

9 Does Roblox have any Battle Royale equivalence within Roblox?

10 **A.** Yes. They have lots.

11 **Q.** And you've described what the Creative Mode is and the
12 types of user-built content that *Fortnite* has. Does Roblox
13 have that?

14 **A.** Yes, they do.

15 **Q.** And in terms of experiences like concerts or other types
16 of content, are you familiar with whether Roblox has that?

17 **A.** They do. I think they just through -- they threw a Lil
18 Nas X concert.

19 **Q.** That's a musician?

20 **A.** Yes. I think he has got the number one hit right now or
21 something.

22 **Q.** Does *Fortnite* view Roblox as one of its competitors in all
23 these categories?

24 **A.** Absolutely.

25 **Q.** In your view, is there an industry standard definition of

1 what could be called a game?

2 **A.** I don't think so, no.

3 **Q.** How much does it cost to download and play *Fortnite*?

4 **A.** In general, *Fortnite* is free to play in download.

5 **Q.** Why?

6 **A.** Another one of the special things about *Fortnite* is -- and
7 even strategically kind of the way we came about the game was
8 we knew how important social connections were, and so we have
9 lots of information that says if you play with a friend,
10 you'll play the game more.

11 And so fundamentally we want to have as many and as strong
12 social connections as possible inside the game. And so one of
13 the barriers to a social connection can just be a gate price.

14 So imagine like you're going to -- there's a concert
15 somewhere or a real live concert, and it costs \$50, and you
16 and your friends all want to go, but you don't have \$50.
17 Well, guess what? You're not going to the concert, and you're
18 not spending hours with your friends, and you're not all
19 hanging out together that evening.

20 So a gate price is the same thing for *Fortnite*. We want
21 as many people to be able to come in and have 12.3 million
22 people attend the Travis Scott concert at the same time.

23 There should just be no barrier to those connections and those
24 experiences.

25 **Q.** Just to be clear, does a user have to pay anything

1 whatsoever to watch Travis Scott?

2 **A.** No.

3 **Q.** That's true of all of the experiences within Party Royale

4 that you walked through? Those are all free?

5 **A.** Yes.

6 **Q.** How does *Fortnite* go about making money then?

7 **A.** *Fortnite* sells digital items, primarily basically
8 cosmetics. We don't provide any sort of a game play advantage
9 so they don't make you better inside the game. It's just a
10 way to express yourself inside of the game.

11 **Q.** So in terms of the content not offering a game play
12 advantage, why aren't you offering any in-app purchases that
13 advance someone's game play?

14 **A.** It kind of relates back to that conversation around social
15 connections. We want it also to be a fair experience for
16 everybody playing the game, and we think that a paid -- you
17 know, a pay-to-win mechanic, which is what we would call it in
18 the industry, where you basically have an advantage over other
19 players inside the game is inherently unfair, and so we would
20 never have a pay-to-win mechanic in a player-versus-player
21 experience.

22 **Q.** And so in terms of the digital content that is available,
23 the -- the cosmetics that you described, how does a user go
24 about obtaining that content that is offered within *Fortnite*?

25 **A.** There's two primary ways. You can purchase V-Bucks, which

1 is a digital currency which you can then redeem for cosmetics
2 inside the game. Basically you take this virtual currency, go
3 to the *Fortnite* shop, and you can buy individual items. Or we
4 have these things called Real Money Transactions. We call
5 them RMTs. But essentially these are bundles of cosmetics
6 that are generally priced at a discount that you purchase for
7 a real dollar amount inside of the game.

8 **Q.** Where can users obtain those Real Money Transactions?

9 **A.** So, yes. The RMTs, these Real Money Transactions, are
10 available inside of a game, but there is a couple ways that
11 you can also buy them outside of the game as well.

12 On the consoles, Xbox and PlayStation and Nintendo, you
13 can purchase these RMTs right alongside where you would
14 download the *Fortnite* client, so you go into the Xbox Store,
15 you go to the *Fortnite* in there, and you could see these
16 separate cosmetic bundles that would be available.

17 You can also buy these in a limited amount at actually
18 retail, so you could buy a cosmetic bundle at a
19 brick-and-mortar store as well. We've got some cases of that
20 also.

21 You can also get it from the Epic Games Store separately
22 as a purchase outside of the *Fortnite* client.

23 **Q.** So with respect to the console stores, you were just
24 describing how these RMTs are offered sort of separate and
25 apart from offering *Fortnite* for download. When *Fortnite* was

1 available on iOS, were those same Real Money Transactions
2 available on the Apple App Store?

3 **A.** No. We were not able to offer those.

4 **Q.** Just going back to you said users can buy V-Bucks and
5 redeem them. Is purchasing individual cosmetic items one by
6 one the only way to purchase digital content within *Fortnite*?

7 **A.** No. There is other ways. You can actually -- we have a
8 couple different, I guess, products inside of the game. One
9 is the Battle Pass, and the Battle Pass -- there is basically
10 one about every ten weeks that arrives in the game, and it's
11 essentially just a collection of cosmetic goods that you can
12 purchase, and then you unlock that content by playing the
13 game. It is, you know -- from the player's perspective, it is
14 kind of the best value that you can get inside of the game.

15 In addition to that, in December of 2020, we launched
16 *Fortnite* Group, which is a subscription offering, and in that
17 subscription offering, you pay \$12 a month, and you receive a
18 thousand V-Bucks each month. You receive a cosmetic --
19 basically an exclusive cosmetic pack, and you receive the
20 Battle Pass as well, in addition to some other stuff that we
21 throw in every month.

22 **THE COURT:** What does that cost? You said \$12?

23 **THE WITNESS:** Yeah.

24 **BY MS. MOSKOWITZ:**

25 **Q.** Why did you launch the subscription service?

1 **A.** If you play *Fortnite* regularly, then every ten weeks -- I
2 mentioned this thing called the Battle Pass, and you have all
3 these different events going on. Then you are making these
4 transactions, you know, semi-regularly. And every time you do
5 that, you're going into a purchase screen, you're maybe having
6 to purchase V-Bucks before then you go and purchase cosmetics,
7 or you separately don't want to store your credit card
8 information, and so you are entering that in every time, and
9 so it's just -- there's additional kind of friction and work
10 that you have to do in order to make a purchase.

11 And so if you play *Fortnite* regularly, the subscription
12 was created so that you are getting an awesome deal.
13 Certainly if you are buying V-Bucks plus the cosmetic set plus
14 the Battle Pass, this is the best value in the game, but you
15 are only having to make that transaction once.

16 **Q.** So this -- between buying the Real Money Transactions or
17 the RMTs outside of *Fortnite* and buying digital content within
18 *Fortnite*, where do most users make their purchases?

19 **A.** The large bulk comes from inside the client.

20 **Q.** Inside *Fortnite*?

21 **A.** Inside of *Fortnite*.

22 **Q.** So going back again just for a moment for when *Fortnite*
23 was available on iOS --

24 **A.** Uh-huh.

25 **Q.** -- when a user made a purchase within *Fortnite*, their iOS

1 *Fortnite* app, and for some reason wanted a refund, what
2 happened in that circumstance?

3 **A.** In that situation, the player needs to go to Apple to
4 request a refund. It is a cause of confusion for players
5 because they spend all of their time inside *Fortnite*. They
6 are playing this, you know -- this experience that they know
7 is provided by Epic Games, and so they come to us and they
8 say, "Hey, I had an issue" or "Hey, I had trouble," or "Hey,
9 why didn't this thing show up," and they come to Epic, and we
10 have to say, "I'm sorry. You have to go to Apple actually to
11 fix this." And it's just a poor experience because they don't
12 really know what's going on.

13 **Q.** Would you have those issues if you could offer your own
14 payment processor?

15 **A.** No, we don't, and we do have our own payment processor
16 with the Epic Games Store so we handle that whole experience
17 for the player.

18 **Q.** What impact, if any, from your perspective would it have
19 on Epic if it could not offer in-app purchases within
20 *Fortnite*?

21 **A.** It would be devastating, really. Completely sink the
22 business in its current form.

23 **Q.** Why?

24 **A.** There's a lot of reasons.

25 First, the *Fortnite* game client itself is the best way to

1 actually present and show what you are purchasing. So imagine
2 you're buying a cosmetic inside of the game. Well, you can
3 actually -- in *Fortnite*, you can take that outfit and you can
4 zoom in on it and you can look at all the detail and the belt
5 buckle that the artist spent weeks putting together. You can
6 spin it around. You can see the cloth simulation and
7 everything kind of flapping. You can see the specular
8 reflections of the metal and the cool outfit if you're
9 purchasing in E Mode. Like one of the fun dances, you can
10 actually play it and see it animate and do all the things and
11 see all the cool effects and all that stuff inside of the
12 client.

13 And so it's like this is, you know -- this is the kind of
14 "try before you buy." If you were doing that outside of
15 *Fortnite*, you can't do any of those things. You would
16 probably be relegated to just having a small image, you know,
17 of -- you know, static image. If you were lucky, maybe you
18 would have a video. But the way I would describe it is the
19 difference is almost going to Macy's and actually putting on
20 an outfit and getting in front of a mirror and being able to
21 turn around and look at it and go, "Oh, this looks nice"
22 versus trying to purchase something through like a mail-order
23 catalog and just seeing the single static image and kind of
24 being like, "Well, I hope it works" or "I hope it fits."

25 **Q.** Are there other reasons why *Fortnite's* business would

1 suffer if it were not able to offer in-app purchases?

2 **A.** Yeah. Another key way is when you go into *Fortnite*,
3 you're going into -- you're basically immersing yourself into
4 an experience. You're going in and you're making friend
5 connections and social connections and you're -- and you're --
6 you're essentially wanting to go to this place, you know, for
7 some set amount of time.

8 If suddenly you then have to leave that experience, you're
9 totally breaking the immersion of it. I guess at that point
10 you tell your friends, "Hey, I know we're all really excited
11 about the Travis Scott concert and I guess we're all here
12 celebrating it, but I'm going to leave and boot up my computer
13 or find my phone and I'm going to scroll and go and find this
14 thing and then I'm going to purchase it and then I'm going to
15 come back into the game." Maybe. I don't know. Like, you
16 leave the game, so you may not come back. Maybe you make a
17 purchase. Maybe you go make a sandwich and then you don't
18 come back into the game. It's just like a totally disjointed
19 experience, and it's like absolutely, absolutely everything
20 that we don't want people to do. We don't want you to leave
21 the game when you're trying to make a purchase.

22 **Q.** Can't Epic just monetize *Fortnite* by offering in-app
23 advertising paid?

24 **A.** No. Philosophically we just would never do that. Ads are
25 a terrible experience, I think. This one is pretty easy to

1 understand. If you have ever -- if you've ever watched a
2 movie on cable and you've got an ad in your face every ten
3 seconds -- or even ten minutes -- it feels like ten seconds --
4 versus just streaming something on Netflix from start to
5 finish, I think it's pretty easy to see that that is a
6 superior experience. The ad free experience is superior.
7 That is *Fortnite* to the tee. We do not want that.

8 **Q.** So let's shift gears to marketing.

9 Fortnite -- at a high level, what are Epic's goals with
10 respect to marketing for *Fortnite*?

11 **A.** Sure. At a high level, we want to bring in new users, and
12 we want to engage the existing users who are already inside of
13 *Fortnite*.

14 **Q.** Is one of those goals more important than the other from
15 your perspective?

16 **A.** No. New users can represent your future growth. Those
17 existing users are basically your core. These are the people
18 who are playing your game. Target both equally.

19 **Q.** What does Epic do to market *Fortnite* at a high level?

20 **A.** This -- this is another one of those funny things about
21 *Fortnite* that is a little bit different. At a really high
22 level, how we try to market is -- believe it or not, the
23 biggest marketing vehicle that we have is the game itself.
24 We've got 30 million people going through on a given day. I
25 just can't buy an ad that has that reach and hits that market

1 like our current user base.

2 And so, believe it or not, whenever we're building events
3 or we're premiering content, we're actually using the game
4 itself to hype up that experience, and we do that in a number
5 of ways, but it's -- it's basically through the far endgame
6 narrative and also through various messaging tools that we
7 have inside of the game as well.

8 **Q.** So let's start with the narrative-related aspects that you
9 just described. Can you explain what *Fortnite* is doing within
10 *Fortnite* on a marketing side with respect to narrative
11 content?

12 **A.** Sure. We have a lot of just kind of *Fortnite* lore that is
13 constantly occurring, and so we will create these really cool
14 experiences that are happening over the course of a season,
15 and we will introduce new characters and introduce plot lines,
16 and these all kind of get the user to understand why certain
17 characters are important, why they should care about a certain
18 thing inside of a game, and we'll kind of breadcrumb those
19 experiences to build up to a particular release or a
20 particular launch or a particular event.

21 **Q.** Did I -- I'm sorry. I thought you were starting to ask a
22 question.

23 Are there any other narrative-related aspects to what
24 you're doing within *Fortnite* to market?

25 **A.** Sure. We're also partnering with IP holders, so this

1 would be your Disneys, your Avengers-type partners, and so we
2 will separately create experiences inside of a game where we
3 will do some crossover event, and it's really built to be a
4 celebration of our fan base and their fan base, and we do some
5 really cool event that -- that feels authentic, and then often
6 we'll sell cosmetics associated with those events as well.

7 **Q.** Are the live events that you described earlier -- do those
8 factor in in any way to the narrative-related marketing?

9 **A.** Yes. We also host live events as well. This is basically
10 when -- this is basically like your Travis Scott event. But
11 we have all sorts of various live events that we do. We had
12 one with Marvel that was really successful as well.

13 And in these live events, we have countdown clocks and
14 countdown timers. For the Travis Scott concert, we actually
15 had posters that started showing up and it said "Astronomical
16 show," you know, "Tune in for these show times." And so what
17 ends up happening is we are starting to hype and premiere and
18 start conversation inside of the game and then we try to
19 amplify that then outside of the game.

20 **Q.** Are those events that you just described geared in any way
21 toward attracting new users?

22 **A.** Absolutely.

23 **Q.** Are the types of new users that you are hoping to get
24 different in any way from your existing base?

25 **A.** Yes. *Fortnite* grew exceptionally fast, and we actually

1 reached a pretty significant penetration on console very
2 quickly. So a lot of the events, when we are trying to create
3 them, were specifically focusing on partnerships or
4 collaborations that have wide social reach and inherently also
5 wide mobile reach. And so we will, you know -- there is a
6 reason why we target somebody like Neymar most recently. He
7 just came into a game. Neymar is an international soccer
8 icon. He is like top 15 most followed person on Instagram.
9 And he has tremendous social reach. And so we partner and
10 bring these folks into the game because they have incredible
11 social reach and mobile reach in places that we normally can't
12 access or reach an audience that may normally have never even
13 considered *Fortnite*, but they're fans of Neymar, and they say,
14 "Oh, cool. That actually looks really neat. I can go take
15 part in this Neymar experience inside of *Fortnite*."

16 **THE COURT:** What is the existing base?

17 **THE WITNESS:** I'm sorry?

18 **THE COURT:** You said it's different from the existing
19 base. I'm asking what the existing base was as the foundation
20 for your statement.

21 **THE WITNESS:** I was saying the existing
22 console-penetrated base where we've kind of largely saturated
23 it on Xbox and PlayStation, and so we're focusing on
24 additional new activations that try and bring a wider
25 audience.

1 **THE COURT:** Okay.

2 **BY MS. MOSKOWITZ:**

3 **Q.** And have those events, those types of events, in fact
4 attracted those mobile users?

5 **A.** Yes.

6 **Q.** So going back to how you do in -- within *Fortnite*, you
7 also mentioned in-app messaging tools. Can you describe
8 those?

9 **A.** Yes. We have a number of different messaging tools inside
10 the app. We have a "message of the day," for example, when
11 you first log in. You go in and you get this nice, awesome
12 splash screen that is basically a full-size screen of a render
13 that we've created, a really cool marketing image. We can
14 show video content through that screen as well.

15 We also have just a whole series of various kind of
16 pop-ups and banners that we can use to provide information on
17 the cool new things that are happening inside the game,
18 whether it's new features or new outfits.

19 And then separately, the Item Shop itself almost serves as
20 a marketing tool. We program in the content in the Items Shop
21 to be seasonally relevant, so in summer you are going to see
22 summer-themed outfits or regionally relevant and so around
23 cultural events like Carnival in Brazil, you are going to see
24 party-themed outfits and festival-themed outfits that are
25 arriving in the Items Shop as well, so it's --

1 **THE COURT:** Let me back up on the existing base
2 question. So do you have one hundred percent of that base?

3 **THE WITNESS:** No. The research that we've looked at
4 is we are probably closer to 80, maybe 90.

5 **THE COURT:** Okay. Thank you.

6 **BY MS. MOSKOWITZ:**

7 **Q.** So we talked about what you are doing within *Fortnite* to
8 help market. What are you doing -- are you doing anything
9 outside of *Fortnite* to market?

10 **A.** Yes. So we kind of start within the game, and we start
11 creating these experiences and building buzz and the hype, and
12 then we amplify that across a whole different number of
13 channels.

14 We will do your traditional paid user acquisition
15 campaigns. We have got our social channels, which are some of
16 the biggest in all of entertainment and certainly the most
17 engaged, which just means chatter and people talking. Like,
18 we have gigantic social channels, so we use that.

19 There is a lot of things we do in real life as well,
20 especially when it's not in a lockdown situation, but we host
21 tournaments and we do kind of community events and festivals.
22 You know, the Fortnite World Cup was an example of a really
23 big competitive turn amount that we actually ran in New York
24 that had over 10,000 people attend. And then we also have a
25 supportive creative program which is basically a paid

1 affiliate program.

2 **Q.** And just to use -- you used the term "paid user
3 acquisition." Is that what we might think of as advertising?

4 **A.** Yeah. It's basically your traditional I'm buying a search
5 ad, I'm buying a static image ad, I'm buying a video ad.

6 **Q.** You mentioned that you have a large -- *Fortnite* has a
7 large social media presence. Do you have an estimate of how
8 many followers across the various media channels *Fortnite* has?

9 **A.** It's over a hundred million.

10 **Q.** You mentioned the types of paid advertising that Epic
11 does. Do you do videos in connection with that or trailers?

12 **A.** Yes. Around some of our larger beats, we actually create
13 really cool cinematic content, and we use those both just, you
14 know, to kind of -- like you would a cinematic trailer to kind
15 of build hype and buzz. We also will use those in our paid
16 advertising.

17 **Q.** Do you have any examples of those that come to mind?

18 **A.** Yes. One that we actually did was around our Star Wars
19 collaboration, and the first kind of Star Wars cosmetic that
20 we had entering the game was the Imperial Stormtrooper so we
21 created a special trailer for that.

22 **MS. MOSKOWITZ:** Your Honor, I would like to publish a
23 video that has been marked for identification as PX2783. We
24 are actually going to be offering this into evidence. I do
25 believe there is no objection, but again before publishing it,

1 I just wanted to confirm that it is okay.

2 **THE COURT:** You said 278?

3 **MS. MOSKOWITZ:** 2783.

4 **THE COURT:** No objection?

5 **MR. DOREN:** Correct, Your Honor.

6 **THE COURT:** All right. Go ahead.

7 I take it for this one since it's not a demonstrative, you
8 have like a flash drive or something for us? How are you
9 actually putting it in evidence?

10 **MS. KLOSS:** Your Honor, we will provide you a flash
11 drive with the video file.

12 **THE COURT:** Okay. Thank you.

13 Is there audio?

14 **MS. MOSKOWITZ:** There is.

15 **THE COURT:** All right. The court reporter --

16 **MS. MOSKOWITZ:** Actually -- I apologize.

17 **THE COURT:** To the extent there is, the court
18 reporter is relieved of her duties to transcribe that portion.

19 **MS. MOSKOWITZ:** Thank you, Your Honor.

20 Mr. Rudd, would you please.

21 (Whereupon, the video was played.)

22 **THE COURT:** No words, other than that great theme
23 song that we all know.

24 So 2783 is admitted.

25 **MS. MOSKOWITZ:** Thank you, Your Honor.

(Plaintiff's Exhibit 2783 received in evidence)

BY MS. MOSKOWITZ:

Q. How much money does Epic spend on marketing *Fortnite* per year?

A. Between the paid ads that I talked about and the events and that supportive creator affiliate program, it's over \$300 million a year.

Q. Overall, can you tell us how much Epic has spent on marketing *Fortnite* in total?

A. Over a billion dollars.

Q. Do you have an understanding as to whether Epic's *Fortnite* marketing has been successful?

A. Yes, it has.

Q. And how so?

A. Depending on how you slice it, I think *Fortnite* is the largest single entertainment launch of all time. That would be across film, that would be across interactive, and across sport.

Q. Has *Fortnite* been financially successful?

A. Yes.

Q. And to what do you attribute *Fortnite*'s financial success?

Who was driving that, in other words?

A. That was Epic. I mean, that was us. We did that work.

MS. MOSKOWITZ: Your Honor, I just want to ask, I am moving on to another topic, but we do still have a couple

1 minutes left, but I will definitely not be finishing today, so
2 I wanted to ask what your preference would be.

3 **THE COURT:** If it's a different topic, we can stop at
4 this point.

5 So what is *Fortnite* doing for Mother's Day? I guess
6 mother's don't want their kids to be playing on games during
7 Mother's Day.

8 **MR. DOREN:** They will be doing something now.

9 **THE COURT:** Maybe they do. Maybe they do.

10 **MS. MOSKOWITZ:** Actually, you are right. Maybe they
11 do.

12 **THE COURT:** Maybe they do. We will leave it at that
13 in terms of discussion.

14 I do, at the end of this day here at the end of this first
15 week -- I will say again, great lawyers in the courtroom.
16 Sometimes you win, sometimes you lose, but all in all, again,
17 I appreciate you trying to make this as easily accessible as
18 is possible. Having the binders worked better. That was much
19 more smooth today than it was yesterday.

20 With respect to these documents that are sealed, we have
21 to get our arms around that. We have not. So this is what
22 I'm going to require.

23 I want those documents in general by 5:00 p.m. every day
24 so that you leave the courtroom, you go figure it out, and you
25 send them to me so I can address it first thing in the

1 morning. I'm not going to do that for today because I'm not
2 going to look at them today, but by noon tomorrow, I want all
3 of these outstanding sealing issues addressed so that we can
4 take care of it over the weekend for you.

5 Mr. Doren, did you have something you wanted to address?

6 **MR. DOREN:** Just one question, Your Honor. I know
7 that by agreement of the parties and assent by the Court, next
8 week was to begin with the experts, and I just wanted to
9 know --

10 **THE COURT:** You're mic is not on.

11 **THE CLERK:** I turned it on. Sorry.

12 **MR. DOREN:** I'm used to hearing an echo. There I am.

13 Your Honor, I know by stipulation of the parties and
14 assent of the Court that we were going to start with experts
15 next week, and my question is simply whether we will be
16 finishing Mr. Weissinger Monday morning before that or whether
17 he will now be he deferred until after the experts?

18 **MS. FORREST:** Your Honor, our preference would be --
19 strong preference would be to continue and finish
20 Mr. Weissinger and then immediately go into the experts.

21 **MR. DOREN:** I would join in that, actually.

22 **THE COURT:** Okay.

23 So how much more do you have, Ms. Moskowitz?

24 **MS. MOSKOWITZ:** Best guess would be 20 minutes.

25 **THE COURT:** Okay.

1 And, Mr. Doren, what does your cross look like?

2 **MR. DOREN:** 30 to 40.

3 **THE COURT:** Okay. So that way you all know for
4 purposes of your experts.

5 **MR. DOREN:** Thank you, Your Honor.

6 **THE COURT:** So, sir, you are -- you may step down for
7 the day.

8 **THE WITNESS:** Thank you, Your Honor.

9 **THE COURT:** We will see you on Monday morning.

10 Yes?

11 **MS. FORREST:** I just had one housekeeping matter,
12 Your Honor.

13 Yesterday at transcript -- trial transcript pages 879 and
14 880 -- and I have conferred with Mr. Doren about this --
15 Your Honor asked us to confirm that the first group of
16 documents that had gone in were in fact business records, and
17 Mr. Doren and I have gone through them and we have confirmed
18 that they are.

19 One of them, PX052, is a series of Apple emails, the
20 bottom earliest one of which is actually a Tim Sweeney email
21 on top of which others comment, and so that one is subject to
22 the same ruling Your Honor has as it now is a standing comment
23 on taking evidence as it is.

24 But they are all confirmed as business records,
25 Your Honor.

1 **THE COURT:** Okay. Thank you.

2 Mr. Doren, anything else?

3 **MR. DOREN:** No, Your Honor. Thank you.

4 **THE COURT:** Okay. Well, I will extend my well-wishes
5 to all the mothers in this courtroom, all the mothers in the
6 remote war rooms, and to all those who may be listening. I
7 myself am postponing until my son gets home from college,
8 which is next week. I would much rather be with him for that,
9 too.

10 But, again, I hope you all have a good weekend. Try to
11 get a little bit of rest, and we'll see you all Monday
12 morning.

13 We stand adjourned. Thank you.

14 (Proceedings adjourned at 3:16 p.m.)
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CERTIFICATE OF REPORTERS

We, Diane E. Skillman and Pamela Hebel, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. We further certify that we are neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that we are not financially nor otherwise interested in the outcome of the action.

_____/S/DIANE E. SKILLMAN_____

Diane E. Skillman, CSR, RPR, FCRR

_____/S/ PAMELA HEBEL_____

Pamela Hebel, CSR, RMR, FCRR

SUNDAY, MAY 9, 2021